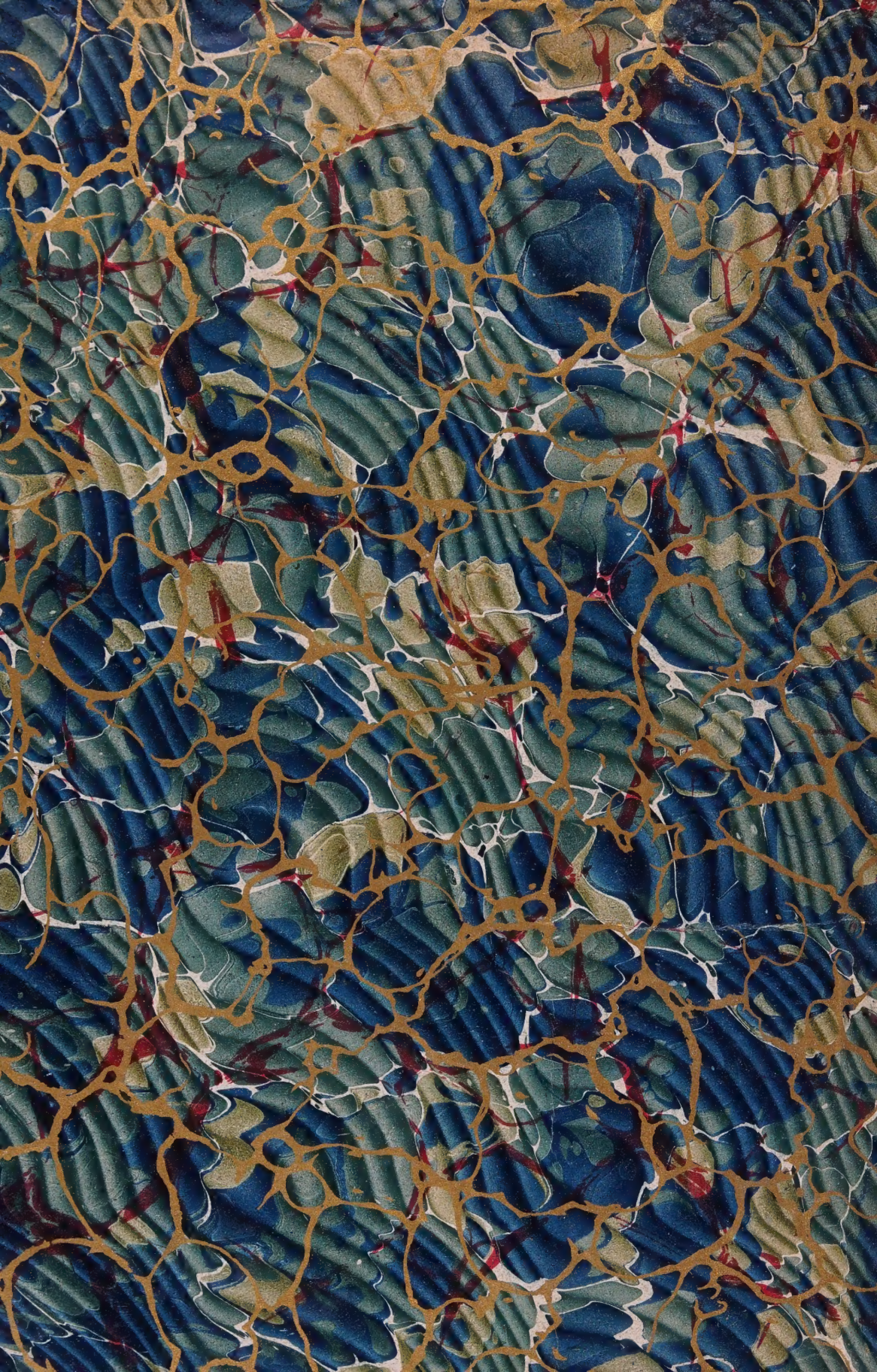
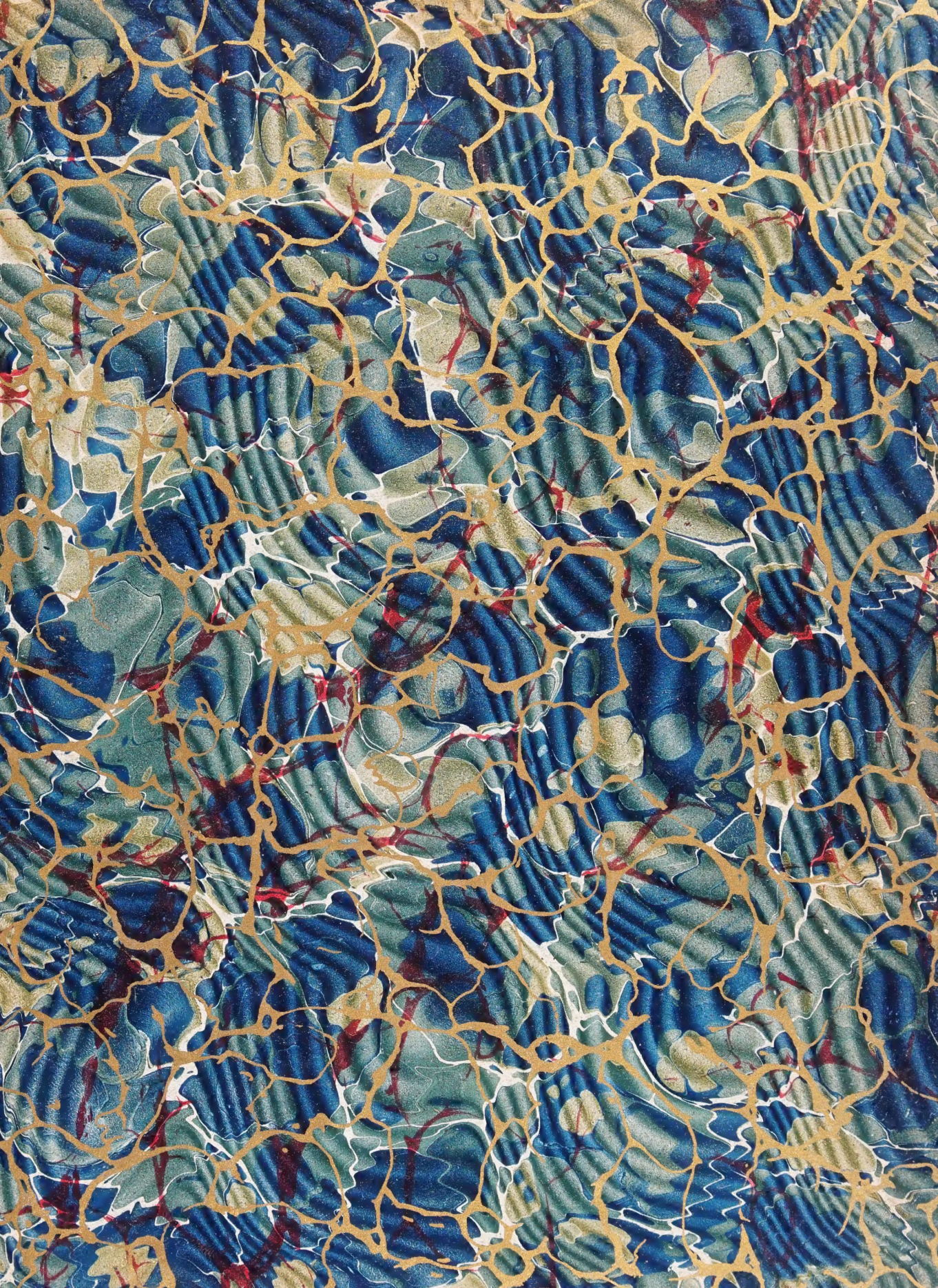


WILLIAM C. TRULL





To be argued by
EDWARD M. SHEPARD
for Appellant.

In the Supreme Court,

APPELLATE DIVISION—SECOND DEPARTMENT.

THE BROOKLYN HEIGHTS RAIL-
ROAD COMPANY,

Respondent,

against

THE BROOKLYN CITY RAILROAD
COMPANY,

Appellant.

No. 317.

April, 1911.

BRIEF FOR APPELLANT.

The defendant's appeal is taken from a money judgment entered in Kings County on 3rd March, 1910, for \$3,383,572.51 upon the report, dated 25th February, 1910, of the Hon. D-CADY HERICK, to whom all the issues were referred to hear and determine. Of this great recovery, the sum of \$26,633.98 was for plaintiff's costs, the Referee's fees alone having amounted to \$14,500. The Referee's award against the defendant, exclusive of costs, was originally for

actual quotations, which we trust are precise, to lessen inconvenient reference to the eight volumes of the record.

The greater length to which the brief has grown through some repetitions of references to the record is the result of our effort to aid the Court by keeping before it on each one of the nine great questions (any one of which might have been the subject of a separate and serious lawsuit) and in a manner easy for verification, the facts bearing on that question even if already given under another question. And the still greater length owing to quotations from the authorities, will, we trust, lessen, not increase, the labors of the Court. The quotation in each case will help its members to determine whether the authority be so relevant as to justify the trouble of specially examining it.

GENERAL NATURE OF THE CONTRO- VERSY.

In December, 1892, and for many years before, the defendant was a street railroad corporation owning and operating an extensive system of railroads throughout Brooklyn. In that month its authorized capital stock was \$12,000,000, the par of each share being \$10; and of such authorized capital \$9,000,000 was issued and \$3,000,000 unissued. It had outstanding \$3,000,000 of bonds secured by first mortgage upon its property—the mortgage providing for a further issue of \$3,000,000 in bonds of the same series. There were, besides, underlying mortgages on portions of the property which had been assumed by the defendant, amounting to \$925,000, making, in effect, defendant's total funded debt at that time \$3,925,000, and its total issue of capital securities \$12,925,000.

The defendant had, on 1st July, 1892, begun the change of the motive power of its railroads from horses to electricity, and on such change had since then expended about \$1,350,000 (*fol.* 8201, 8368, 8519, 8548). This work is, in the controversy, sometimes called the "electrification" of the railroads, and sometimes "construction" or "construction work," but more usually "conversion." From June, 1892, until 6th June, 1893, when defendant, under the Lease, surrendered to plaintiff possession of its properties, no construction work was done by it other than the work of electrification or "conversion" (*Finding* 28 at *fol.* 343). And upon the trial both parties and the Referee assumed that payments made, whether for such electrification or "conversion" proper or for other original construction were—

"to be treated as if all had been made in
"the conversion of defendant's railroads into
"an electric railroad" (*Finding* A-1 at *fol.*
533).

In December, 1892, Hollins & Company, a firm of bankers doing business at New York, proposed to the defendant that it lease its entire railroad property to a street surface railroad company upon the terms that—

- (a) 10 per cent. dividends should be guaranteed on defendant's stock; that
- (b) The lessee should assume all fixed charges, taxes, assessments and license fees of the defendant, and also pay the expenses of keeping up defendant's organization, furnishing it with suitable offices, etc.; that
- (c) Defendant's surplus should be "divided in due time among the stockholders;" that
- (d) A fund of \$4,000,000 should be deposited by the lessee to guarantee the performance of the lessee's obligations; that

- (e) All of the lessee's stock should be acquired by a traction company which should have a capital of \$30,000,000; and that
- (f) Defendant's stockholders should have the right to purchase three shares (\$300 in par value) of the traction company's stock for every ten shares (\$100 in par value) of their respective holdings of stock in defendant at the rate of \$15 for each share of the new stock.

Finding II for plaintiff, *fols.* 654-657.

Finding 3 for defendant, *fols.* 292-302.

This proposition was approved by defendant's directors on 12th December, 1892 (Finding III for plaintiff at *fol.* 658). Plaintiff was designated by Hollins & Co. as the proposed "street surface railroad company." A form of Lease was prepared; and, on 6th January, 1893, the Hollins proposition for the Lease was, with the knowledge, and without the disapproval, of Hollins & Co. and plaintiff, set forth in a circular to defendant's stockholders, who, by a two-thirds vote at a meeting held on 15th February, 1893, pursuant to a written notice accompanying the circular, approved the proposition and with it the Lease which had already, on the preceding day, been approved by two-thirds of plaintiff's stockholders. Such Lease, dated, executed and acknowledged on 14th February, 1893, is the foundation of plaintiff's alleged cause of action.

Complaint, *fols.* 15-17, 37-135.

Finding Third of Decision, *fols.* 728, 729.

Findings 3, 5, A-7 and A-66 for defendant at *fols.* 292-303, 537, 620.

Finding V for plaintiff, *fols.* 659, 660.

The term of the Lease was 999 years; and it included all of defendant's railroads, franchises, real estate, horses, personal and all other property whatsoever of defendant, except (1) its franchise to be a corporation and except (2) its

“moneys, credits and securities on hand” (*fols.* 57-64). The annual rental was fixed at 10 per cent. upon defendant's stock then or thereafter outstanding and, in addition, a sum equal to the prescribed interest upon defendant's entire bonded debt, including the bonded debt of the lessor companies which it had assumed (*fols.* 82-85). The defendant bound itself to apply, from time to time as the plaintiff should request, to payment of the cost of the work of electrification or “conversion,” moneys as follows :

(a) The amount of defendant's moneys, credits or securities on hand when the Lease should take effect, less the amount of its indebtedness other than bonded debt, and less also the amount of its surplus earnings at that date diminished by the ratable accrual of taxes and rentals on that date. This was to be the *Fund under Art. IV of Lease* (*fols.* 67-68). This first Fund, being such balance of defendant's moneys, etc., as it stood on 14th February, 1893, the day the lease was executed, after deducting its current indebtedness and its surplus, was upwards of \$200,000 (*infra*, p. 83).

(b) The proceeds at par of \$3,000,000 of additional but then authorized stock of defendant to be issued within six months after the delivery of the Lease and the proceeds up to par of \$3,000,000 of new but then authorized bonds to be issued from time to time as requested by the lessee. Such \$6,000,000 was to be the *Fund under Art. V of the Lease* (*fols.* 69-70).

The Lease further required the deposit by or for plaintiff of the \$4,000,000 guaranty fund. And the Lease was not, according to its terms, to take effect, or possession thereunder to be surrendered,

until such deposit should be made. Plaintiff made the deposit on 6th June, 1893, and thereupon and on that day possession was delivered. Meantime, from 14th February to 6th June, 1893, defendant had remained in possession, had operated the railroad and received the income therefrom and had, at an expense of as much as \$1,481,057.58, proceeded with new work of "conversion" (findings A-2 at fol. 534, A-35 at fol. 559). This was done at the request of the owners of plaintiff's entire capital stock, and with the plaintiff's knowledge and approval; and the plaintiff, as the Referee found, received the benefit of such expenditure. The Referee, however, refused to allow defendant for it. The result of the expenditure was that the balance of defendant's cash assets on hand above its indebtedness and surplus—that is to say, the balance which was available for new "conversion" in addition to the par proceeds of the \$6,000,000 of new securities and which had, on 14th February, thus been upwards of \$200,000 *infra*, p. 83, had entirely disappeared, so that on 6th June there was a deficit of upwards of \$1,100,000. That is to say, defendant's entire surplus and a large part of its fund for the payment of floating debt were represented only by its investment in the "conversion" of its railroads.

We beg the Court at the outset to realize this feature of the case as it was conceded below and found by the Referee. On 14th February, 1893, when the Lease was made, defendant had outstanding such \$12,925,000 in par of capital securities; and it had, according to its books as then written up, expended \$12,424,645.65 for cost of its railroads (finding A-76 at fol. 631) leaving, of par of its capital securities, for application to capital investment, according to the Referee (Finding Ninth at fol. 738), the sum of \$500,354.35. Defendant then owed debt incurred for further cost of the rail-

road in the sum of \$296,439.78 (Finding A-12 at fol. 542); and when that should be paid from the \$500,354.35 there would remain of capital for further conversion the sum of \$203,914.57. This was then represented by the remainder of defendant's cash and securities on hand after deducting floating debt and surplus, such remainder being defined by Art. IV of the Lease to be the fund which defendant should provide for conversion in addition to the \$6,000,000 to be provided under Art. V, thus making in all available on 14th February, 1893, for defendant's expenditure on conversion (that is to say, on construction) the sum of \$6,203,914.57. This was the financial condition of the defendant which was before its directors and stockholders when on 15th February, 1893, they authorized the lease, and which was likewise before Hollins & Co., the owners of all the shares of plaintiff's stock when *they* authorized it. And it is in the light of that situation that the Lease is to be interpreted.

From 14th February, 1893, until 6th June, 1893, when defendant transferred possession to plaintiff, defendant had, at the request of Hollins & Co., the owners of the entire capital stock of the plaintiff, and with the knowledge of plaintiff's officers and directors, thus continued its expenditure on conversion which had been going on since 1st July, 1892. And after 6th June, 1893, defendant further continued such expenditure until a time shortly prior to 1st August, 1894, when defendant, as is conceded (Finding A-5 at fols. 535, 536), had completed whatever expenditure for conversion it ever made, and when, according to its claim, it had expended upwards of the \$6,000,000 required by Art. V of the Lease, and fully performed its obligations thereunder. Whereupon on 17th August, 1894, an adjustment between plaintiff and defendant with respect to such expenditure was made and reduced to writing in a contract under seal of that date called the "Tripartite Agreement."

The parties to that agreement were the defendant, the plaintiff and the Long Island Traction

Company, then the owner of all the shares of plaintiff's capital stock. By it the parties stipulated that defendant had then, under the Lease, paid for conversion more than the Lease called for by \$308,340.35, and that plaintiff should, by way of final settlement, give defendant a note for that amount, in which the Traction Company should join as maker. The principle upon which the parties reached the final composition and adjustment of the Tripartite Agreement was this: That the fundamental and true meaning of the Lease in suit, carrying out the Hollins agreement, was—

1. That defendant should deliver into plaintiff's possession for the 999 years of the Lease a railroad system which should, at the time of such delivery or within a reasonable time thereafter, have cost \$18,925,000, the par of its then issued or authorized capital securities; and that defendant should, from its funds then on hand or from the proceeds at par of the portion of such authorized capital securities not yet issued, provide cost of conversion to an amount equal to the unexpended balance of such \$18,925,000.
2. That, reciprocally, plaintiff should, by way of rental, pay the stipulated rate of interest or dividends at 10 per cent. annually upon the entire par amount of bonds and stock issued to provide such expenditure on the railroad up to, but not exceeding, such sum of \$18,925,000.

In applying what plaintiff and defendant, when the Tripartite Agreement was made in August, 1894, considered to be such true and fundamental meaning of the Lease, defendant's overpayment of \$308,340.35 is shown to have been made substantially as appears in the following table. The immediate method of calculating it was not the same as here shown; but, as we shall fully state in a more appropriate place (*infra*, pp. 175-178), the effect and

intent of the calculation then made were precisely the same as this :

Defendant's Capital Expenditure.

(1) Expenditure prior to 14th February, 1893, (Finding A-76, at fol. 631; <i>vide infra</i> , p. 68)...	\$12,424,645.65
(2) Expenditure subsequent to 14th February, 1893, (Finding A-36, at fols. 560, 561; <i>vide infra</i> , p. 294), divided as follows :	
For work done, but not paid for, before 14th February, 1893, (Finding A-12, fol. 542)	\$296,439.78
For work done, 14th February to 6th June, 1893, (Finding A-75, fol. 628).....	1,481,057.58
For work done after 6th June, 1893, (being the difference between the total according to finding A-36 and the portions found, as above, to have been expended prior to 6th June)	4,622,985.78
	<hr/> 6,400,483.14
(3) Expenditures subsequent to 14th February, 1893, an inadvertent omission from Finding A-36 of the items of \$4,102.48 and \$1,891.40 mentioned in stipulation proposed by plaintiff at fols. 1238, 1239 (<i>vide infra</i> , p. 294).....	5,993.88
(4) Expenditure originally but erroneously charged to operation, and transferred to construction by "journal entries," as stated below, pp. 294, 295....	586,410.87
(5) Other corrections of defendant's books (<i>infra</i> , p. 295).....	24,236.81
	<hr/> \$19,441,770.35

Deduct :

(6) For real estate, &c. (part of original capital investment) sold, (Finding A-75 at fol. 629, <i>infra</i> , p. 295).....	\$192,889.26	
(7) Other Capital items not included in Finding A-75 but given in Finding A-37 at fol. 563 (rebates, and other adjustments found in A-37 aggregating \$18,284.33, of which A-75 credits only \$2,438.13; <i>vide infra</i> at p. 295)...	15,846.20	
(8) Payments by plaintiff for defendant's operation (<i>infra</i> at p. 295).	41,349.95	250,085.41
Defendant's actual investment.....	\$19,191,684.94	
“ capital securities.....	18,925,000.00	
“ surplus invested in rail-roads.....		266,684.94
Interest on surplus (<i>infra</i> , p. 295)...		41,655.41
		<hr/> \$308,340.35

It was upon the basis of these charges and credits which appeared on defendant's books that the amount of the note was computed at \$308,340.35 for the Tripartite Agreement in August, 1894. The note was paid in 1895.

The Referee, on the other hand, rejected this basis, and ignored the Tripartite Agreement on the ground that it was voidable by plaintiff because

authorized by directors who held shares of defendant's stock. He declined to allow defendant for any expenditure for conversion done prior to 6th June, 1893. He allowed it conversion expenditure after 6th June, 1893, amounting to \$4,626,751.27 (being \$3,765.49 more than the \$4,622,985.78 shown in the foregoing statement); but from this he deducted the amount of such note for \$308,340.35, amounting with interest to \$324,476.81, and also \$42,532.84 of alleged operation expenses paid by plaintiff, and left defendant credited with \$4,259,741.62. Deducting the last amount from the \$6,000,000 which defendant was to provide under Art. V of the Lease, there remained \$1,740,258.38, for which principal sum and interest thereon from 1894 the Referee gave judgment against defendant.

Such are the two rival statements of the measure of defendant's compliance with the requirements of Arts. IV and V of the Lease that it provide a fund for conversion,—the former the statement whose result was agreed upon between the parties promptly at the end of defendant's expenditure in August, 1894, and embodied in the Tripartite Agreement only eighteen months after the Lease was executed—the latter first prepared many years afterward for the purposes of this law suit.

Defendant claims that the Referee's conclusion is not supported by his own findings but is very inconsistent with them and with the undisputed evidence.

PRINCIPAL QUESTIONS IN THE CASE.

The defendant submitted to the Referee *Nine Principal Questions* presenting defenses or objections to plaintiff's recovery, all of which were overruled. And it is upon such questions, as follows—and in addition upon various interlocutory and subsidiary objections and exceptions—that this Court is now asked to reverse the Referee's decision :

FIRST PRINCIPAL QUESTION:

Between 14th February, 1893, the date of the making of the Lease and of its approval by defendant's stockholders, and 6th June, 1893, when, under the Lease, possession of the railroad property was delivered to plaintiff, defendant expended in new "conversion" work as much as \$1,481,057.58 (Findings A-2 and A-3 at *fols.* 534, 535; Findings A-34 and A-35 at *fols.* 558, 559; Finding A-75 at *fols.* 628, 629). Plaintiff accepted the "conversion" work thus done (Findings A-4 and A-65 at *fols.* 535, 620); the work was done upon the request and with the knowledge of the owners of all the shares of plaintiff's stock; it was done with plaintiff's knowledge and without objection on its part, and after the Lease was executed although before delivery of possession (Findings 16 at *fol.* 336; A-51 at *fol.* 607); and such capital expenditure by defendant inured to the benefit of plaintiff (Finding 17 at *fol.* 336). Plaintiff refused to allow the expenditure from the funds provided by the Lease on the ground that, although made after the date and execution of the Lease, it was made before the Lease "took effect" by delivery of possession thereunder. Unless the expenditure were allowed to defendant upon its obligation to expend \$6,000,000, it would have to be paid for out of defendant's surplus and capital, although the agreement had assured the defendant the whole of its surplus for distribution among its stockholders. And the result would be the reduction of annual dividends payable to defendant's stockholders below the stipulated 10 per cent. Nevertheless, and with that very result—that is to say, the result, if this appeal fail, that the expenditure of upwards of \$1,481,057.78 was an absolute loss to defendant, although an advantage to the full amount to the plaintiff—such expenditure of

defendant between 14th February and 6th June, 1893, was disallowed by the Referee. And this is defendant's first objection to the judgment appealed from. Although it does not cover the entire judgment (though the greater part), it is, for convenience, placed first in the discussion because the argument of it involves a full presentation of the general situation of the parties, with an analysis of their original agreement and the facts bearing upon its interpretation.

SECOND PRINCIPAL QUESTION:

On 17th August, 1894, plaintiff and defendant made the "Tripartite Agreement," in the execution of which there joined with them the Long Island Traction Company, the "traction company" provided for in the Hollins proposal, which had become and then was the owner of plaintiff's entire capital stock. At that time the defendant had long since made all the expenditure, which it has ever made, for "conversion" purposes; and the plaintiff and a certain Disbursing Committee, for whose payments plaintiff claims credit, had made all but \$563,484.78 (*infra*, at p. 153) of the entire amount of the expenditure of \$1,740,258.38, for which, with interest, the Referee rendered his judgment. At that date, therefore, plaintiff's present claim, whatever its validity, was to the extent of more than two-thirds of it, in full existence. The Tripartite Agreement provided what was in effect a complete adjustment and accord between plaintiff and defendant. It recited an overpayment by defendant on "conversion" to the extent of \$308,340.35 and required plaintiff and the Traction Company to pay defendant—and by promissory note they did so pay—that amount in full satisfaction of the accord. The agreement further required the plaintiff, at its own cost, to make what further investment was necessary to complete the

conversion ; and it provided for loans of money by defendant to plaintiff to relieve the latter's pecuniary necessities. The Referee rejected this defense on the ground that the Tripartite Agreement was voidable at the option of the plaintiff because a majority of plaintiff's directors who authorized the execution of it held shares of defendant's stock.

And the Referee so held with plaintiff, and by his decision in effect avoided the agreement, notwithstanding the assent to the agreement by the Traction Company which owned plaintiff's entire capital stock. Although the Traction Company was not a party to this suit, and although there was no evidence whatever of objection or even dissatisfaction on the part of any stockholder of the Traction Company, or on the part of the Traction Company itself, the Referee in effect held the assent of the Traction Company void for the reason that a majority of the directors of that Company held shares of stock in the defendant Company.

This ruling—the legal reasoning for which the Referee has not stated—the defendant submits to have been erroneous. And, if erroneous, the entire judgment must fall.

THIRD PRINCIPAL QUESTION :

The third principal question ruled by the Referee against plaintiff also goes to plaintiff's entire cause of action. It is, Whether, since the Tripartite Agreement, being a sealed instrument, executed in due form by both parties, and having beyond doubt, so far as its form went, duly recited and declared an adjustment and satisfaction between the parties barring the cause of action at law pleaded by plaintiff, plaintiff could, upon the trial, turn the suit—directly or indirectly—into a suit primarily to set aside the agreement under a claim of right to avoid it for sheerly equitable reasons? Could plaintiff, under our judicial procedure—even under the Code provision relating

to a plaintiff's right, without any pleading after his complaint, to litigate new matter set up by the answer—convert this trial of a strictly and exclusively common law cause of action, alleged in plaintiff's favor, into a trial of a distinct, affirmative, equitable and necessarily preliminary cause of action, also in plaintiff's favor, but never alleged, to set aside the Tripartite Agreement? Could plaintiff rightly succeed in this, although, until the establishment of its unpleaded and supposititious equitable cause of action, it had no right whatever to assert the common law cause of action set forth in the complaint?

The Referee held that plaintiff could do this, but without stating the reasoning which brought him to the conclusion. This, the appellant submits, was error.

FOURTH PRINCIPAL QUESTION:

Plaintiff's cause of action being one to recover for defendant's alleged breach of its covenant to expend the proceeds not exceeding par of \$6,000,000 of its new securities—

“ in payment *at the request of the plaintiff*
“ from time to time of the cost of convert-
“ ing the railroads” (Complaint, *fol.* 21),

the defendant has claimed—but the Referee has decided otherwise, for reasons not stated by him—that it was essential to plaintiff's alleged cause of action that there should be proof and finding, not only that such request was made by plaintiff in accordance with the allegation of the complaint, but further, that *defendant failed to comply with such request*. The fact, as found by the Referee (Finding A-44 at *fols.* 581-582), is that no such request was made by the plaintiff during the period of conversion with which defendant has not complied—and further that, after

that period, no request was made of defendant that it apply any moneys to conversion (Finding A-46 at *fol.* 582-593). That is to say, that plaintiff has made no request for expenditure by defendant with which defendant has not complied. Or in other words, that plaintiff made no request for defendant's expenditure of the moneys which—defendant not expending them—plaintiff claims to have been thereby compelled itself to expend.

The defendant submits, therefore, that, upon this ground also, the plaintiff's cause of action fails entirely.

FIFTH PRINCIPAL QUESTION:

The fifth main question arises upon defendant's affirmative defense (Answer at *fol.* 167) that—

“ Plaintiff is not the owner of the claim,
“ demand or cause of action mentioned and
“ set forth in the complaint or any part
“ thereof.”

The defendant submits, upon the facts set forth in the Referee's findings 53 at *fol.* 389-393, and 76, 77, 78, 79, 80, 81, 82, 83, 84 and 86 at *fol.* 423-506, 508-517, that, before the commencement of this suit, plaintiff's alleged cause of action adjudged below in its favor had been assigned by it by way of mortgage; that the mortgage had been foreclosed; that the alleged cause of action with all of plaintiff's rights therein had been bought in upon the foreclosure by a purchaser other than the plaintiff; and that, from the purchaser, by *mesne* assignments, the title to such cause of action had come to the Brooklyn Rapid Transit Company, and later become subject to the mortgage of that company to the Central Trust Company. Neither the Brooklyn Rapid Transit Company nor its mortgagee nor any other owner of the supposed cause of action

was or is a party to this suit. And defendant submits that, whatever the merits of the cause of action, the present plaintiff, from a time before this suit was begun, has not owned it or had any right to recover upon it.

This defense was overruled. In the absence of any opinion by the learned Referee we are left to surmise why, upon his own findings, defendant should not have succeeded.

SIXTH PRINCIPAL QUESTION:

Included in the recovery below is the sum of \$308,340.35 with interest from August, 1894. This represents a promissory note for that sum which plaintiff delivered to defendant in August, 1894, in pursuance of the Tripartite Agreement. The note was fully and voluntarily paid by the plaintiff to the defendant before the present suit was brought. The Referee found (Finding XXXIX at fols. 694, 695) that the note was delivered without consideration. The only other finding which may be supposed to have any tendency to support this part of the recovery, is the finding that, at the time when the note was given by the plaintiff, some of plaintiff's directors, who authorized its making and delivery, held shares of stock in the defendant. There is no finding of misrepresentation or any fraud or of mutual mistake.

Plaintiff's recovery of this part of its judgment—precisely as of the remainder of it—was upon the allegation and the Referee's decision that defendant did, as to that amount as well as to the remainder of the \$1,740,358.38, the principal of the recovery, fail to make the stipulated payment for cost of conversion. *But the finding of the Referee is that defendant DID pay such \$308,340.35 for cost of conversion.*

Findings XXXVIII and XXXIX at
fols. 692-697.

Defendant insists, therefore, that so much of plaintiff's recovery was entirely unfounded, because

- (1) The present suit had no relation to that cause of action which plaintiff has never pleaded or offered to plead;
- (2) Whether or not the Tripartite Agreement could be validly enforced by defendant against plaintiff, its provisions as to the \$308,340.35 promissory note were completely executed by the giving and payment of the note;
- (3) Plaintiff's suit here was and is solely to recover for defendant's default in making conversion payments;
- (4) The recovery of the \$308,340.35, included in the principal of the present recovery as not having been paid for conversion when in fact it had been, was error; and because
- (5) There could be no cause of action on plaintiff's part, to recover back the amount, unless in a suit for that purpose, alleging fraud, mutual mistake, or the like, or some other recognized ground of recovery.

Defendant further insists that the note was given, not only upon the authorization of plaintiff's board of directors, but with the written consent and approval of the owner of all of plaintiff's capital stock—such owner having been the Long Island Traction Company. Here again plaintiff objected that the directors of the Traction Company who gave its consent were disqualified because they held shares of defendant's stock. But defendant replies that neither the Traction Company nor any of its stockholders has made any such objection or is a party here.

In the absence of any opinion by the Referee, we do not know upon what theory he allowed this part of the recovery, which, with interest, amounts to the great sum of \$600,000 and more.

SEVENTH PRINCIPAL QUESTION :

This is the question, Whether the adjustment of accounts between plaintiff and defendant which was effectuated by the Tripartite Agreement, were not intrinsically just.

We shall under the *Second Principal Question* discuss that agreement upon the assumption that in some degree, more or less, plaintiff could show it to have been originally incorrect or unjust ; and, even then, as we shall argue, it should, after all these years, stand as matter of law and equity and justice. Under the *First Principal Question* we shall show that the allowance which the Tripartite Agreement made to defendant of its expenditure of \$1,481,057.58 and more for conversion work during the period 14th February-6th June, 1893, was both just and lawful. Our discussion under this *Seventh Principal Question* will, however, be concerned with the original justice of the further provision of the Tripartite Agreement that plaintiff and the Traction Company should, as they did, give the note of 15th August, 1893, for \$308,340.35, which was afterwards paid ; and so with the intrinsic injustice of the Referee's ruling (not considered under the *Sixth Principal Question*) that, in this suit, there must be deducted from the actual cash expended by defendant on conversion after 6th June, 1893, the sum of \$308,340.35 and interest. And the present question further involves the justice of certain allowances known in this litigation as the "journal entries," made to defendant in the Tripartite adjustment of August, 1894. On 30th June, 30th September and 31st December, 1893, and 31st March, 1894, the defendant, in accordance with its practice of many years, had, by entries in its journal, transferred from its "operation account" and other revenue accounts to its "construction account" certain items of expenditure strictly for construction which, for con-

venience in current bookkeeping, had temporarily, and since the last such transfer, been entered against operation or current accounts. In large part the items were portions of larger single items, which were applicable in part to operation and in part to construction, but, as to which, sound judgment in making and measuring the distinction required superior accounting ability and time, which could not be given day by day. The total amount of such "journal entries" allowed defendant in the adjustment was about \$700,000. But the judgment below in this case involved the rejection of only a part of this sum. That is to say, the refusal of the Referee to allow defendant for its February-June expenditure and his deduction from defendant's expenditure after 6th June, 1893, of the amount of the \$308,340.35 note and interest, produce far the greater part of the \$1,740,258.38, the principal of the recovery—all of it, indeed except, perhaps, about \$300,000.

The fundamental inquiry here concerns the original merits of the Tripartite Agreement. The question is in chief part this: Whether the true intent of the Lease and Hollins proposal were not, as stated above (p. 10) and as conceded by plaintiff and defendant and all concerned, in August, 1894, that defendant should be allowed for the full actual cost of its railroads up to \$18,925,000; that defendant should not be required to make advances for conversion beyond what would make such cost equal \$18,925,000; and that, on the other hand, plaintiff's rental should be based on such full cost. That is to say, that plaintiff should annually pay the amount of the stipulated interest on defendant's bonded debt and dividends on its stock representing the actual cost, up to \$18,925,000, of the railroad property turned over to plaintiff for the 999 years of the Lease.

EIGHTH PRINCIPAL QUESTION.

The \$1,740,340.38 of principal recovered by plaintiff was alleged by it (*fols.* 29-31), and decided by the Referee (*fol.* 741), to be money paid prior to 26th October, 1894, *by plaintiff* in order to procure done the "conversion" for which defendant wrongfully refused to pay. Such allegation and decision were necessary to establish the cause of action. But, in making up such \$1,740,340.38 the findings of the Referee show (Finding A-42, *fols.* 567-572) that there was included \$862,964.75 of payments not made by plaintiff, but made by a certain "disbursing committee" provided for, and acting under, the Tripartite Agreement (finding A-10, *fols.* 539-541; finding A-20, *fols.* 549, 550), and consisting of members appointed by plaintiff and the Traction Company and approved by defendant's president and the president of the New York Guaranty and Indemnity Company (Finding A-10 at *fols.* 539-541). By that agreement it was provided that the advances of \$1,375,000, which defendant agreed to make under the terms thereof, either directly in cash or from proceeds of sale of portions of defendant's real estate included in the Lease and not needed for railroad purposes, should, after certain specified credits, be advanced to, and expended by, the "disbursing committee" (Articles Eighth, Ninth and Eleventh at *fols.* 221-227, 229-232). Defendant was to receive collateral trust notes as security for its advances (Art. Sixth, *fols.* 217-219). In addition to defendant's proposed advances to the Disbursing Committee, plaintiff and the Traction Company were elsewhere to raise \$1,500,000 under the agreement upon other of such collateral trust notes therein provided and to pay that over to the Disbursing Committee (Art. Second, *fol.* 211-212).

The Tripartite Agreement was in these respects carried out; the collateral trust notes were issued; plaintiff and the Traction Company procured money

to be advanced by defendant and others, upon security in chief part the property of, and furnished by, the Traction Company; the money went to the Disbursing Committee and by it were applied upon conversion (findings A-20 at *fols.* 549, 550 and A-10 at *fols.* 539-541).

And now, plaintiff, repudiating the Tripartite Agreement, asks to recover—and the Referee has awarded against defendant—as much as \$734,935.61 (Finding A-42 at *fols.* 567-572, *vide infra*, p. 339) of the very moneys which were applied to conversion by the Disbursing Committee and not by plaintiff—moneys which were never actually received by, and were never in the hands of, plaintiff—moneys which were merely and sheerly fruits of the agreement which plaintiff repudiates with the approval of the Referee.

Appellant will argue that plaintiff cannot recover for moneys which it never itself expended. And we shall further argue that plaintiff, since it rejects the Tripartite Agreement as not binding on it, cannot recover as expended by it the \$734,935.61 of moneys raised and received and paid out by the Disbursing Committee; and, on the other hand, that, if plaintiff ask to recover such \$734,935.61, then it cannot be listened to when it asks to avoid that very agreement.

Nor did the Referee give any reason for his answer to this question.

NINTH PRINCIPAL QUESTION:

This objection is to the allowance by the Decision of interest for the period from 1st September, 1894 (the date being changed by supplemental finding to October 26th, 1894), until the date of the Decision. The amount of the interest allowance was \$1,616,680.15 (*fol.* 745), which by the supplemental finding

was reduced to the sum of \$1,600,447.82 (*fol.* 713). The Referee disregarded the facts that

- a.* The principal amount claimed to be due by defendant was never ascertained until the Referee made his decision; that
- b.* There was not, and could not be, any sum due from defendant to plaintiff until the Tripartite Agreement was set aside; and that that result was accomplished only by the Referee's Decision and not until then; and that
- c.* Nothing was due from defendant to plaintiff except as plaintiff should request, and defendant should refuse, the application by defendant under the Lease of moneys to payment of cost of "conversion" and except as thereafter plaintiff should itself make good defendant's default. There was no refusal of any such request. Plaintiff did not make any request which was not complied with until a certain written communication addressed by plaintiff to defendant on the 2nd day of March, 1900; and in that communication there was no demand unless for \$778,582.40, being the sum of the specifically enumerated "journal entries," of which some were conceded by the plaintiff to defendant on the trial and not included in the recovery. The further demand, if any, was merely for an accounting. There was no demand for any specific amount.

Findings, A-44, A-46, *fol.*s. 581-599.

PLEADINGS.

Such, generally, was the nature of the controversy as it was presented to the Referee. It was permitted, against appellant's strenuous objection, to extend far beyond the scope of plaintiff's pleading, so that, in effect, plaintiff was permitted to recover on supposed causes of action which it had not pleaded.

The Complaint.

The plaintiff, when it sued, claimed upon nothing else than a strictly common law cause of action to recover damages for breach of contract. The allegations of the complaint were, in brief, these (*fols.* 13-33) :

(A) Both parties were street surface railroad companies organized under the laws of New York (*fols.* 14, 15).

(B) On 14th February, 1893, each of them—

“executed and sealed with its corporate
“seal and duly acknowledged as deeds * * *
“the contract in writing * * * which
“is hereinafter called the ‘Lease’” (*fols.*
15, 16).

A copy of it is appended as a part of the complaint, and we here summarize its provisions as follows:

Lease.

The chief and essential features of this fundamental document were these :

1. The letting by the defendant to the plaintiff for 999 years of all the railroads and other property of the former, except its franchise

to be a corporation and except its “moneys, “credits and securities on hand” when the lease should take effect (*fols.* 39, 57-65).

2. That defendant’s said “moneys, credits or “securities” on hand at the date when the lease should take effect, less the amounts of—

(a) its indebtedness, other than bonded debt, and

(b) the amount of its surplus earnings at that date (diminished by a *pro rata* amount of accrued taxes and rentals),

should

“be used, applied and expended by the
“lessor in payment, at the request of
“the lessee, from time to time, of the
“cost of converting the railroads of the
“lessor into an electric railroad, or into
“any other kind of railroad authorized
“by law, which shall be approved of by
“the lessor and lessee * * *.”

Lease, Art. IV, *fols.* 67, 68.

3. That the defendant should, within six months after delivery of the Lease, issue its un-issued \$3,000,000 of stock and, “from time “to time as requested by the lessee” should issue the remaining \$3,000,000 of bonds, and that “the proceeds of said stock and “bonds, less any premium realized or received on the sale of the said bonds, shall “be expended by the lessor in payment, at “the request of the lessee, from time to “time, of the cost of converting the railroads “of the lessor into an electric railroad or “into any other kind of railroad authorized “by law, which shall be approved of by the “lessor and lessee * * *.” But, as the fund proved to be insufficient for conversion, it is unnecessary to refer to such possible use of the fund in other construction. No time

for the application of the fund to the payment of cost of conversion work was prescribed, except that, as already recited, it should be

“from time to time” upon “the request of the lessee;”

Lease, Art. V, *fols.* 69-72.

4. That the plaintiff should pay the defendant an annual rental made up of

- (a) a sum equal to ten per cent. upon the entire capital of the defendant not exceeding \$12,000,000; and also
- (b) a sum equal to the prescribed interest upon the entire bonded debt of the defendant not exceeding the authorized \$6,000,000, and also upon other bonded debt which the evidence shows to have consisted of bonds of certain lessor companies assumed by defendant up to \$925,000.

Lease, Art. XIV, *fols.* 82-85.

5. That the plaintiff should proceed diligently with the conversion, and that, if the “said moneys belonging to the lessor on hand at the date this Lease takes effect, after the deductions aforesaid and the proceeds of said stock and bonds * * * shall be insufficient * * *, then * * * the lessee will forthwith furnish and supply all such sums of money, materials and supplies as may be required site * * *.”

Lease, Art. XXII, *fols.* 94, 95.

6. That the defendant should sell its supplies on hand to the plaintiff; that the defendant should pay its entire indebtedness, except

bonded debt, from cash and securities on hand ; *and that the defendant should retain its surplus.* If any of its railroad property should be found unnecessary to the railroad operation, such property might be sold, with the consent of both parties, and the proceeds applied to the electrification.

Lease, Arts. IV, XI, XII, XLV, *fol.*

67, 79–81, 126, 127.

Note : The circular to the defendant's stockholders accompanying the notice of their meeting at which, on 15th February, 1893, they ratified the Lease, stated that the surplus would be distributed among them.

Finding 3 at *fol.* 299.

7. That plaintiff should assume the defence of all suits then pending or thereafter to be brought against the defendant, and pay all judgments recovered in suits against the defendant. The plaintiff was further to pay during the term of the lease the current cost of maintaining the corporate existence of the defendant and of receiving the rentals and paying them out to its bondholders and stockholders.

Lease, Arts. XXXIV, XVI, *fol.* 107–

111, 88.

8. That—as was the plain intent of the Lease, although it did not contain in words such an article—the defendant should, when the provisions of the Lease were carried out, apart from its corporate franchise, be left without any property in its actual possession and without any property in its ownership, except its surplus and its landlord interest in the railroad system and its interest and rights under the lease-contract with the plaintiff and in the security deposit of

\$4,000,000 thereunder to be made as will now be mentioned.

Lease, *fols.* already cited and also Arts. VI, VII, VIII, XIII, XXX, *fols.* 72-77, 81, 82, 104.

9. That plaintiff should secure its payment of rental and other performance of the lease-contract by a deposit, with the Brooklyn Trust Company, of \$4,000,000 on the date of delivery of the Lease.

Lease, Arts XXXV-XXXIX, *fols.* 111-118.

10. That the Lease should

“ *not be binding or valid* as to either
“ of the parties hereto until approved by
“ the vote of the stockholders ” (Lease, *fol.* 132).

The Lease further provided

“ that, if so approved, *this lease shall*
“ *be delivered to the lessee* at such time
“ and upon such terms and conditions as
“ shall be agreed upon by the Boards of
“ Directors of said lessor and lessee.”

And the Lease further provided that

“ notwithstanding such approval and
“ delivery, *this lease shall not go into*
“ *effect nor shall the lessee be entitled*
“ *to enter into possession of the premises*
“ * * * until said \$4,000,000 shall
“ have been actually deposited * * *.”

Lease, Art. XLVII, *fols.* 132, 133.

The complaint further alleged—

(C) That the Lease which had been executed and acknowledged by both parties on 14th of February, 1893, was approved by two-thirds of the stockholders of each of the parties, on the same day as to

the plaintiff, and on the next day, 15th February, 1893, as to the defendant (Complaint, *fol.* 16, 17).

And further, that, prior to 6th June, 1893,

“all matters and things by law required
“to be done, observed and performed to au-
“thorize the plaintiff and the defendant to
“enter into said contract and to execute and
“mutually deliver the same and to consti-
“tute the same a valid and binding contract
“upon the plaintiff and the defendant, were
“fully complied with, performed and ob-
“served.”

Complaint, *fol.* 17.

And further that, before 6th June, 1893, the plaintiff actually made the \$4,000,000 deposit; and on that day the

“lease went into effect, and the lessee
“therein (being the plaintiff herein), was en-
“titled to, and did enter into possession of
“the premises * * * and the plaintiff
“has since continued and still is in posses-
“sion thereof under and by virtue thereof.”

Complaint, *fol.* 18, 19.

(D) That, at the time of the execution and delivery of the Lease, \$3,000,000 of defendant's capital stock was authorized, but unissued; and \$3,000,000 of its mortgage bonds were also authorized and unissued; that, in accordance with the covenants of the Lease—

“the defendant did within six months or
“thereabouts after the delivery of said
“lease begin the issue of three million dol-
“lars (\$3,000,000) of its capital stock there-
“tofore unissued, but authorized to be issued,
“and it did thereafter sell and dispose of
“the same at par, and thereafter and be-
“tween about the 30th day of September,
“1893, and about the 31st day of March,
“1894, did issue *at the request of the plain-*

“ *tiff* said three million dollars (\$3,000,000)
 “ of its bonds theretofore unissued, * * *
 “ The total proceeds of said stock and bonds
 “ after deducting the premiums * * *
 “ amounted to the sum of six million dol-
 “ lars (\$6,000,000), *which was the amount*
 “ *which in and by said lease the defendant*
 “ *agreed should be expended by the de-*
 “ *fendant in payment at the request of the*
 “ *plaintiff* from time to time of the cost of
 “ converting the railroads of the defendant
 “ demised by said lease to the plaintiff into
 “ an electric or into any other kind of rail-
 “ road authorized by law which should be
 “ approved by the plaintiff and the de-
 “ fendant. * * * ”

Complaint, *fols.* 19-21, 23-25.

(E) That—

“ The whole of the said sum of six million
 “ dollars (\$6,000,000) was required for the
 “ purpose of the payment of the cost of
 “ converting the railroads * * * into
 “ an electric railroad ; * * * that both
 “ the plaintiff and the defendant approved
 “ of the conversion of the said demised
 “ railroads into an electric railroad, *and*
 “ *that the plaintiff from time to time,*
 “ *prior to September 30, 1894, requested*
 “ *the expenditure by the defendant* of the
 “ said last-mentioned sum in payment of
 “ the cost of converting the railroads so
 “ demised into an electric railroad, and the
 “ defendant, *in accordance with such re-*
 “ *quest,* did from time to time expend prior
 “ to September 30, 1894, various portions of
 “ said last-mentioned sum in payment of
 “ the cost of converting the said railroads
 “ * * * and the total amount so ex-
 “ pended by the defendant prior to Septem-
 “ ber 30, 1894, * * * did not exceed
 “ the sum of four million dollars (\$4,000,000),
 “ and *the defendant* had not prior to Sep-

“ tember 30, 1894, and has not prior to the
“ commencement of this action expended
“ more than said sum of four million dollars
“ (\$4,000,000) for any or all of the purposes
“ for which the defendant covenanted and
“ agreed in and by the lease to expend the
“ proceeds of said stock and bonds, which
“ proceeds so agreed to be so expended by it
“ was the said sum of six million dollars
“ (\$6,000,000).”

Complaint, *fols.* 26–29.

(F) That—

“ Prior to September 30, 1894, the plain-
“ tiff had expended out of its own funds
“ more than two million dollars (\$2,000,000)
“ in payment of the cost of converting the
“ said railroads * * * which expenditure
“ by the plaintiff was over and above all ex-
“ penditures made by the defendant for such
“ purpose, directly or indirectly. * * *”

In the same paragraph of its complaint
plaintiff further alleged that it

“ had from time to time, at various times
“ prior to September 30, 1894, demanded and
“ requested the payment by the defendant to
“ the plaintiff of the said sum of two million
“ dollars (\$2,000,000), which payment would
“ have been an expenditure by the defendant
“ in payment of the cost of converting the
“ said demised railroads into an electric rail-
“ road as the defendant had agreed to do
“ * * *; but the defendant failed * * *
“ to pay the said sum of two million dollars
“ (\$2,000,000) or any part thereof. * * *”

Complaint, *fols.* 29–31.

and that—

“ the plaintiff has at various times prior
“ to the commencement of this action de-

“ manded and requested the payment * * *
“ of the said *indebtedness* of two million
“ dollars (\$2,000,000).”

Complaint, *fol.* 32, 33.

Plaintiff thereupon demanded judgment against the defendant for such sum of \$2,000,000 with interest from 30th September, 1894.

The Answer.

The answer consisted of four divisions, the *first* including admissions and denials, the *second* (not separately stated) setting up that plaintiff did not own the cause of action, the *third* (numbered “second”) setting up the Tripartite Agreement, and the *fourth* (numbered “third”) setting up a counterclaim. We give here a synopsis of the portions material for the argument :

(*a, b, c*) Defendant admitted the allegations of the complaint concerning the incorporation of the parties, the execution and authorization by the stockholders of the Lease and the doing of all things necessary to constitute the same a valid and binding contract.

Answer, *fol.* 155.

(*d*) Defendant further admitted the allegations of paragraph IV as to the deposit of the \$4,000,000 and the doing by plaintiff of everything necessary to entitle it to enter into possession of the property, and its entry into such possession on 6th June, 1893, and its continuance in possession since.

Answer, *fol.* 156.

(*e*) Defendant denied knowledge or information as to whether the Lease “went into effect” on 6th June, 1893.

Answer, *fol.* 156.

(f) It admitted that the \$6,000,000 of new stock and bonds were authorized although not issued; and alleged that such securities were "on hand" (*fols.* 156, 157). Defendant admitted the sale of such stock and bonds, and that the proceeds, less the premiums on the bonds, were \$6,000,000. Defendant denied that the amount which, under the Lease, it was to expend at plaintiff's request from time to time for conversion was \$6,000,000; and defendant set forth the provisions of Art. IV of the Lease to the effect that it should apply to conversion upon lessee's request from time to time, all moneys, credits or securities on hand at the date when the Lease should take effect, less lessor's indebtedness and less the amount of its surplus earnings diminished by a *pro rata* amount of accrued interest, rentals and taxes.

Answer, *fols.* 157-161.

(g) The answer alleged that the securities *on hand*, mentioned in Art. IV of the Lease, referred to and included the \$6,000,000 of new bonds and stock

Answer, *fols.* 161, 162.

(h) The answer, Paragraph V, admitted that the whole sum of \$6,000,000 was required for conversion, and that plaintiff from time to time, prior to September 30th, 1894, requested the expenditure by defendant of \$6,000,000 in payment of cost of conversion and denied the allegation that its expenditure for conversion, prior to 30th September, 1894, or prior to the commencement of this action, did not exceed \$4,000,000. It further denied in Paragraph VI that plaintiff had demanded or requested the expenditure by it of the sum of \$2,000,000 alleged by plaintiff to have been expended by it over and beyond the sums advanced by defendant. It affirmatively alleged that its expenditure prior to 30th September, 1894, and the commencement of this action, was a sum largely in excess of \$6,000,000;

and that, prior to that date, it expended the entire proceeds of the stock and bonds and large sums in addition ; and that such expenditure was made—

“ with the knowledge, consent and at the
“ request of the said plaintiff.”

Answer, *fols.* 162–166, 167.

(*i*) The answer in Paragraph VI, denied on information and belief that plaintiff had expended prior to 30th September, 1894, out of its own funds any payments of the cost of converting the railroad over \$2,000,000 in excess of what defendant had expended thereon; and denied that it was obligated to expend such sum in excess of the amount theretofore expended by it.

Answer, *fols.* 166, 167.

(*j*) The answer in its second division (not stated separately or “secondly”) alleged that—

“ plaintiff is not the owner of the claim,
“ demand, or cause of action mentioned and
“ set forth in the complaint or of any part
“ thereof.”

Answer, *fol.* 167.

For a separate and distinct defense the answer set up—

(*k*) The incorporation of the parties (*fol.* 169).

(*l*) Defendant's operation in December, 1892, of its railroads; that they were then operated by horse-power, but that defendant—

“ had just commenced and was in process
“ of converting the same into electric rail-
“ roads ;”

that in that month a syndicate represented by the New York Guarantee & Indemnity Company proposed to defendant to procure the leasing of its rail-

roads by a street surface railroad and a guaranty by the lessee of a dividend of ten per cent. on defendant's capital stock; the deposit of \$4,000,000 as a guarantee fund; the formation of a new corporation which should own the entire stock of plaintiff; and the provision to defendant's stockholders of the right to purchase, at \$15 a share, three shares of the new company's stock of the par value of \$100 each for every ten shares of defendant's stock of the par value of \$10 each held by such stockholders; that the proposition further provided that defendant's surplus should be divided among its stockholders; that that proposition was accepted and approved by defendant's directors and stockholders; and that, prior to June, 1893, the Long Island Traction Company was duly incorporated in Virginia, as such new corporation, with a capital of \$30,000,000, divided into shares of \$100 each.

Answer, *fols.* 169-174.

(*m*) Execution and approval by two-thirds of the stockholders of each of the parties to the Lease of 14th February, 1893; that prior to 6th June plaintiff made the deposit of \$4,000,000, and that on 6th June the plaintiff entered into possession of the demised property and has continued in such possession.

Answer, *fols.* 175-179.

(*n*) That on 15th February, 1893, one Markey, a stockholder of defendant, began, in the City Court of Brooklyn, an action for a judgment declaring illegal and unauthorized the Lease of 14th February, 1893, and therein on 15th February, 1893, procured to be issued out of that court an order enjoining defendant from transferring to the plaintiff any property; that such injunction continued in

force until 6th June, 1893—that is to say, from 15th February, 1893, to 6th June, 1893; and that—

“during the continuance of said injunction
 “the defendant, with the knowledge, approval and consent of the plaintiff, and at its
 “request, continued the work of converting
 “the said railroad * * * into an electric
 “railroad, and continued to advance and
 “expend money out of its own funds for
 “that purpose with like knowledge, approval
 “and consent of the plaintiff and upon like
 “request.”

Answer, *fol.* 179-181.

(o) Issuance of the \$6,000,000 of new securities and application of the proceeds to the cost of conversion.

Answer, *fol.* 182-183.

(p) That in or about August, 1894, plaintiff and the Long Island Traction Company, then the “owner of the entire capital stock of the plaintiff,” applied to the defendant to aid and assist them in borrowing money for the purpose of the conversion; that, thereupon, plaintiff and defendant

“entered into an accounting of the moneys
 “expended by the defendant in payment of
 “the cost of converting the railroads * * *
 “out of the proceeds of said stock and bonds
 “* * * and it was * * * determined * * *
 “between the plaintiff and the defendant that
 “the defendant had paid and expended out
 “of the proceeds of said stock and bonds on
 “account of the conversion * * * upwards of six hundred thousand dollars
 “(\$600,000) in excess of the sum the defendant was required to advance * * *
 “under the terms of said lease, and that it
 “was ascertained, determined and agreed
 “by and between the plaintiff and the defendant, that the sum of three hundred and
 “eight thousand three hundred and forty

“ and 35/100 dollars (\$308,340.35) of said
 “ excess was a portion of the surplus of the
 “ defendant which, under the terms of the
 “ fourth article of said lease, should have been
 “ retained by the defendant, out of the pro-
 “ ceeds of said stock and bonds, and that the
 “ further sum of three hundred and forty-
 “ seven and thirty-six and 44/100 dollars
 “ (\$347,036.44) of such excess was an in-
 “ debtedness due by the defendant on
 “ contracts for converting the railroads
 “ * * * the amount of which said indebt-
 “ edness it was agreed by and between the
 “ plaintiff and defendant should also have
 “ been retained out of the proceeds of said
 “ stock and bonds * * *.”

Answer, *fol.* 183-187.

(q) That, in consideration of such agreement, de-
 fendant agreed with plaintiff and the Traction Com-
 pany (then being the owner of plaintiff's entire
 capital stock) to advance further moneys; that
 thereupon defendant, plaintiff and the Traction
 Company did, on 17th August, 1894, execute
 and deliver with each other the so-called “Tri-
 partite Agreement”; that, in pursuance of that
 agreement, the plaintiff and the Traction Com-
 pany delivered their joint and several note to
 defendant for \$308,340.35, and secured the same
 with collateral; that such note was later on
 paid by plaintiff or the Traction Company, the
 amount thereof being, as already alleged, a portion
 of defendant's surplus which it had applied to con-
 version over and beyond the requirements of the
 Lease.

Answer, *fol.* 187-190.

(r) That, in pursuance of the Tripartite Agree-
 ment, plaintiff and Traction Company delivered to
 defendant their other joint and several promissory
 note for \$347,036.44, representing indebtedness in-
 curred by defendant for conversion which, as

already alleged in the answer, was part of defendant's excess payments for conversion over the stipulated amount of \$6,000,000.

Answer, *fols.* 190-193.

(s) That, in pursuance of the provisions of the Tripartite Agreement, defendant advanced and paid through the Disbursing Committee mentioned in that agreement, and for its purposes, the further sum of \$350,000, for which it received the joint and several notes of plaintiff and the Traction Company, which notes were afterwards paid.

Answer, *fols.* 193-194.

There was annexed to the answer, as a part of it, a copy of the

Tripartite Agreement.

Of this important agreement,—the second fundamental document in the case—thus forming part of defendant's answer, we now give a brief recapitulation. It was dated 17th August, 1894, and was made between defendant, plaintiff and the Traction Company. In it the plaintiff is called the "Heights Company," the defendant the "Brooklyn Company," and the Long Island Traction Company the "Traction Company." It recited the Lease of 14th February, 1893; the ownership or control by the Traction Company of all plaintiff's capital stock; and it further recited that —

"said 'Heights Company' is indebted
 "to said 'Brooklyn Company' in large
 "sums of money for advances made to
 "it by said 'Brooklyn Company' in and
 "about the conversion of said demised
 "railroads into an electric railroad. * * *

Tripartite Agreement, *fols.* 204-206.

It further recited that

“ said ‘ Heights Company ’ and the ‘ Trac-
 “ ‘ tion Company ’ for the purpose of pro-
 “ viding means for the payment of said
 “ indebtedness aforesaid and for the pur-
 “ pose of the completion of said electric
 “ construction and equipment of said rail-
 “ roads are about to issue and dispose of
 “ their joint and several promissory notes
 “ * * * the aggregate not to exceed
 “ \$3,000,000, * * * ”

the same to be secured by a certain mortgage
 to the New York Guaranty & Indemnity Com-
 pany.

Tripartite Agreement, *fols.* 206, 207.

Note : We ask the Court to observe
 that, under Art. XXII of the Lease (*fols.*
 94, 95), the plaintiff, the “ Heights Com-
 “ pany,” covenanted to

“ proceed faithfully and diligently
 “ with the work of converting the said
 “ railroad * * * and that in the event
 “ that the said moneys belonging to the
 “ lessor on hand at the date this lease
 “ takes effect, after the deductions afore-
 “ said ” [that is to say, the *Fund under*
Art. IV] “ and the proceeds of said
 “ stock and bonds of said lessor author-
 “ ized to be issued, but unissued,”
 [that is to say, the *Fund under Art.*
V] “ shall be insufficient to pay and
 “ discharge the cost of converting
 “ * * * , then and in that event
 “ the lessee will forthwith furnish
 “ and supply all such sums of money,
 “ materials and supplies as may be
 “ requisite and necessary for that pur-
 “ pose. * * * ”

The Tripartite Agreement further recited that
 the “ Heights ” and “ Traction ” companies had

secured subscriptions to \$1,875,000 in par value of such collateral trust notes at a price netting them \$1,500,000, and that, in addition to such \$1,500,000, the defendant was willing, upon the terms set forth in the agreement, to provide the plaintiff and the Traction Company with \$1,375,000.

Tripartite Agreement, *fols.* 208, 209.

The agreement then provided—

1. That defendant should provide \$1,375,000

“ to enable the ‘ Heights Company ’ to
 “ meet its indebtedness and complete
 “ the construction and equipment as
 “ electric railroads, of the railroads de-
 “ mised * * * by said lease dated Feb-
 “ ruary 14, 1893.”

Tripartite Agreement (Article First),
fols. 210-211.

2. That the “ Heights ” and “ Traction ” companies should deliver to defendant their note, payable on 1st August, 1897, or sooner, after 1st July, 1895, at their own option, for \$308,340.35—

“ being a part of the indebtedness of
 “ the said ‘ Heights Company ’ to said
 “ ‘ Brooklyn Company ’ ”—

such note to be secured by a sufficient amount of such collateral trust notes taken at $67\frac{1}{2}$ per cent. of par to be equal to the \$308,340.35; and that the amount of such note for \$308,340.35 should be credited on the \$1,375,000 to be provided by defendant.

Tripartite Agreement (Article Third),
fols. 212-215.

3. That defendant should advance from time to time the money requisite to pay any balance due on contracts it had itself made for conversion and any balance due by it as of 6th June, 1893, which balances amounted to \$347,036.44; and that such payment should be credited by plaintiff and the Traction Company to the defendant on the \$1,375,000 to be provided by the defendant.

Tripartite Agreement (Articles Fourth, Fifth), *fols.* 216, 217.

Note : The Court will observe that the provision of the Tripartite Agreement thus was that the amount of the \$308,340.35 promissory note for a conversion payment by defendant made out of its surplus—and which, according to the Lease, it was not bound to make—and the amount of the \$347,036.44 note, being for such balance of defendant's indebtedness upon conversion contracts—should be paid by plaintiff and the Traction Company; and that the sum of \$308,340.35, which was the amount determined to have already been paid out of defendant's surplus, was to be credited upon defendant's obligation to loan without further payment, while the \$347,036.44 was to be so credited when the moneys were advanced by defendant to its conversion creditors. The amount actually paid by defendant beyond the \$308,340.35 was \$350,000, somewhat more than covering the \$347,036.44 (finding 63 at *fols.* 407, 408).

4. That there should be a Disbursing Committee to be nominated by the plaintiff and Traction Company and approved by the presidents of the New York Guaranty &

Indemnity Company and defendant (*fol.* 220); that defendant should

“have the right to pay its said obligations or that it may, at its option, pay the same through the Disbursing Committee * * * ” (*fol.* 220),

and that its

“cash advances * * * under the terms of this agreement other than those made on account of its said obligations, are to be made to the Disbursing Committee * * * ” (*fol.* 234),

and further (*fols.* 240, 241) that

“all moneys * * * that shall be realized by said ‘Heights Company’ or said ‘Traction Company’ from the sale or disposition of said Collateral Trust Notes * * * shall be disbursed under the direction and authority of the said Disbursing Committee. * * * ”

5. That real estate included in the Lease and no longer required for maintenance or operation of the demised railroads should be released from the lien of the Lease and might be sold by the defendant and its proceeds applied—

“to the repayment of all advances made or to be made by said ‘Brooklyn Company,’ * * * ”

and the payment of notes or obligations of the plaintiff and Traction Company delivered to defendant under the agreement.

Tripartite Agreement (Article Eighth),
fols. 221–223.

6. That horses, cars, materials and personal property not required for further use in

the construction, maintenance and operation of the demised railroad should immediately be sold and the proceeds thereof at once applied so far as they would go

“ to the payment and discharge of
“ the said notes and indebtedness of the
“ said ‘ Heights Company ’ or ‘ Traction
“ ‘ Company ’ to said ‘ Brooklyn Com-
“ ‘ pany. ’ ”

Tripartite Agreement (Article Sixteenth) *fols.* 237–240.

7. That if, at any time, there should be default in payment of interest on any note of plaintiff and the Traction Company held by defendant, then at its option,

“ all obligations on its part under the
“ terms of this agreement, or otherwise,
“ to make further advances to said
“ ‘ Heights Company ’ or said Dis-
“ bursing Committee, shall cease and
“ determine. ”

Tripartite Agreement (Article Twentieth), *fols.* 247, 248.

8. That no provision of the agreement was intended to, or should be, construed as—

“ a waiver of any existing or future
“ breach or default of the ‘ Heights
“ ‘ Company ’ under the Lease between
“ it and the said ‘ Brooklyn Company. ’ ”

Tripartite Agreement (Article Twenty-Third), *fol.* 254.

The Tripartite Agreement contains other provisions; but they do not seem to be material to the present controversy.

Defendant's answer fourthly (stated as "Third") set up a counterclaim alleging :

- (t) That defendant had expended on conversion the sum of \$2,522,003.60 over and above the amount which the Lease required it to expend ;
- (u) That by the terms of the Lease the plaintiff had agreed that, in the event that the moneys stipulated to be provided by the defendant should be insufficient to pay the cost of conversion, the plaintiff would make up the excess of such cost ; and
- (v) That plaintiff, in violation of its agreement, had refused to repay defendant such excess.

Answer, *fol.* 195-200.

The answer prayed a dismissal of the complaint and a judgment upon the counterclaim.

The Reply.

The plaintiff met defendant's counterclaim by various denials and allegations setting forth what, in substance, is summarized by the following allegations and argument of the reply :

" that whatever sums were expended by
" the defendant in converting the said rail-
" roads into electric railroads over and
" above the amount of four million dollars
" (\$4,000,000), alleged in the complaint
" herein to have been expended by the de-
" fendant in such conversion, and over and
" above an additional amount not exceeding
" five hundred thousand dollars (\$500,000),
" were so expended by the defendant *prior*
" to February 14, 1893, and the greater
" part thereof a long time prior to said date,
" and long before said lease was contem-
" plated or in process of negotiation ; and

“ that all sums so expended by the defendant
 “ for such purpose between February 14,
 “ 1893, and June 6, 1893, did not exceed all
 “ together five hundred thousand dollars
 “ (\$500,000) * * * ; and no part of any
 “ of the said sums so expended by the de-
 “ fendant for such purpose prior to June
 “ 6th, 1893, was within the terms of the
 “ said lease, and the plaintiff did not by said
 “ lease, or by any other contract or obliga-
 “ tion whatever contract or agree or in any
 “ way become liable to repay any sum
 “ whatever expended for such purpose by
 “ the defendant prior to June 6, 1893
 “ * * * .”

Reply, *fol.* 279-281.

THE TRIAL.

The issues were, on 31st May, 1901, referred to
 Hon. JOHN F. DILLON to hear and determine (*fol.*
 715-717); and the trial proceeded before him until
 in March, 1905, when his resignation as Referee
 was accepted and Hon. D-CADY HERRICK appointed
 as Referee in his place, with the provision that all
 evidence taken before Judge DILLON should be re-
 tained (*fol.* 718-722). The trial continued before
 Judge HERRICK from 1905 to November 18th, 1908
 (*fol.* 7529); and thereafter on 25th February,
 1910, he rendered his decision.

The case on appeal as settled includes all the ma-
 terial evidence (*fol.* 9646).

DECISION, FINDINGS, EXCEPTIONS AND JUDGMENT.

It is to our great regret that Judge HERRICK de-
 livered no opinion. His views upon the numerous
 and serious questions which were raised on the
 trial, and are disclosed by the record, can be in-

ferred only partially from his findings of fact and conclusions of law and his refusals to make other findings and conclusions proposed by the parties. It is only his conclusions without his reasoning or his authorities which are before us.

Decision.

The Decision proper was relatively brief, the Referee finding, as matters of fact:

1. The incorporation of the parties (*fol.* 727);
2. That, before the execution of the Lease, the defendant had for some time been engaged in the work of conversion and had made contracts therefor which were outstanding, and that, for the purpose of raising money for conversion—

“ it had issued and sold its stock and
“ bonds to a considerable amount ” (*fols.*
727, 728);

3. The execution of the Lease and its ratification by stockholders on 14th February, 1893 (*fols.* 728, 729);
4. That, on 17th April, 1893, a written contract was made between the plaintiff and defendant whereby defendant agreed to deliver the Lease on 17th April, 1893, if at that date there should have been deposited with the New York Guaranty & Indemnity Company, as trustee, 270,000 shares of the capital stock of the Traction Company, subject to the right of defendant's stockholders “ for “ 60 days thereafter ” to purchase the same at \$15 a share, each stockholder of defendant to have the right to purchase three shares of the Traction Company's stock for each ten shares of defendant's stock held by him ; that

the agreement provided that on 17th April, 1893, plaintiff would accept the delivery of the Lease and that—

“ notwithstanding the delivery and acceptance of said lease, the same should not go into effect nor should the plaintiff be entitled to enter into possession of the premises and property by said lease demised until the Four million dollars required by the terms of said lease should (*sic*) be deposited as a guarantee fund, should have been actually deposited “ * * * ” (*fols.* 729–733);

5. That the agreement last mentioned—

“ was made pursuant to and in conformity with Article 47 of the lease, and was intended by the parties to prescribe the terms and conditions agreed upon by the Board of Directors of plaintiff and defendant under which said lease should be delivered ” (*fol.* 734);

6. That, on 17th April, 1893, plaintiff and defendant delivered—

“ each to the other an executed and acknowledged copy of the lease ” (*fol.* 735);

7. That, on 6th June, 1893, the \$4,000,000 deposit was made; and that thereupon the plaintiff went into possession of the railroads; and that until that date the defendant continued to operate them and receive the proceeds thereof and pay operating expenses (*fols.* 735, 736);

8. That, after the Lease was executed, defendant continued the conversion work prior to 6th June, 1893, and expended therein—between 15th February and 17th April, 1893, \$571,-

959.62—between 17th April and 5th June, \$884,875.56, and after 6th June, \$56,511.04 (*fol.* 736-738);

9. That, at the time of the execution of the Lease (that is to say, 14th February, 1893)—

“ the defendant had on hand, as the balance of the proceeds of sale of stock or bonds, or stock and bonds, the sum of \$500,354.35 ; which amount was applicable to the work of construction ” (*fol.* 738) ;

10. That, between 14th February, and 6th June, 1893, defendant sold certain real estate not necessary for operation, and received therefrom at least \$165,000 (*fol.* 738, 739) ;

11. That, after 6th June, 1893, and before 1st September, 1894, defendant issued the remaining \$3,000,000 of its stock and \$3,000,000 of its bonds and received for them more than \$6,000,000 (*fol.* 739) ;

12. That, since 6th June, 1893, defendant—

“ has paid and transferred over to the plaintiff or paid in its behalf for the purpose of the construction of said railroad, as provided for in the lease * * * the sum of \$4,259,741.62, of which amount the sum of \$251,335.09 constituted the value of supplies on hand in the possession of the defendant June 6th, 1893 ” (*fol.* 740) ;

Note : There is no finding in the Decision that defendant did *not*, after 6th June, 1893, pay for conversion *more than* \$4,259,741.62, or as much as \$6,000,000.

13. That, after 6th June, 1893, and before 1st September, 1894, plaintiff expended in con-

version more than \$1,740,258.38 in excess of all moneys advanced by the defendant for the purpose (*fol.* 741);

14. That—

“there is a balance due and owing under the terms of said lease from the said defendant and the plaintiff of \$1,740,-258.38 with interest thereon from 1st September, 1894” (*fols.* 741, 742).

Note: The interest date was afterwards corrected to 26th October, 1894 (supplemental finding, *fols.* 712, 713).

The last so-called finding of fact is, on its face, a mere conclusion of law. We ask the Court to observe here that *such conclusion is not sustained by any finding of fact that defendant failed to comply with any request of plaintiff to apply moneys or for expenditure on cost of conversion.*

The Referee stated that he had drawn the following conclusions of law :

1. That the Lease did not take effect until 6th June, 1893 (*fol.* 742).
2. That the defendant was “not entitled to deduct “from the proceeds” of the \$6,000,000 of securities—
“the moneys expended by it, the said defendant, prior to June 6th, 1893, in “converting its railroad into an electric “railroad” (*fols.* 742, 743).
3. That defendant’s expenditure prior to June 6th, 1893, did not constitute a counterclaim in its favor (*fol.* 743);
4. That there had been no accord and satisfaction between the parties (*fol.* 743, 744).

Note: This conclusion proceeded upon no facts found in the Decision proper.

5. That plaintiff was entitled to judgment dismissing defendant's counterclaim upon the merits (*fol.* 744);
6. That plaintiff was entitled to judgment for \$1,740,258.38 with interest from 1st September, 1894, making altogether \$3,356,938.53, with costs (*fols.* 744, 745).

**Findings not originally included in the
Decision proper.**

The findings made by the Referee outside those in the Decision proper are somewhat extensive. In addition there were many requests by defendant that the Referee make findings of fact or conclusions of law, and some such requests by the plaintiff, which were refused by the Referee.

Defendant's Requests and rulings thereon included in the Judgment Roll, *fols.* 289-651.

Plaintiff's Requests and rulings thereon included in the Judgment Roll, *fols.* 652-714.

It will be more convenient to present and discuss such additional findings and requests in the Argument.

The findings actually made by the Referee, whether or not originally included in the Decision proper, are numerous—occupying, when printed together, upwards of 100 pages. For convenience, we have, in small pamphlets, printed separately all of the findings and conclusions of law “arranged by topics”; and these pamphlets are at the service of the Court. There are repetitions in the findings, and some inconsistencies. The appellant invokes the rule that, in cases of inconsistencies or doubt in the findings, it may avail itself of the findings, or

permissible interpretations of them, most favorable to its contentions.

Stokes v. Stokes, 198 N. Y., 301, by VANN, J., at p. 307 :

“ If the usual rule governing inconsistent findings is applied, those favorable to the appellant must prevail, for it is well established that ‘when findings are so inconsistent that it is impossible to harmonize them, it is the duty of the court to accept those most favorable to the appellant, as he is entitled to rely upon them in aid of his exceptions’ (*Elterman v. Hyman*, 192 N. Y., 113, 117; *City of Buffalo v. D., L. & W. R. R. Co.*, 190 N. Y., 84, 98; *Israel v. Manhattan Ry. Co.*, 158 N. Y., 624, 631). * * *

“ It is claimed, however, by the defendant that the rule should not be applied in this case because the findings favorable to the plaintiff were inadvertently made. There is no conclusive evidence of this, and to cut out a clear and positive provision from the findings would be as illegal and dangerous as to cut out a like clause from a contract.”

Whalen v. Stuart, 194 N. Y., 495, by WERNER, J., at p. 502 :

“ The rule is well settled that an appellant who seeks to reverse a judgment which is based upon inconsistent findings is entitled to the benefit of those that are most favorable to him (*Bonnell v. Griswold*, 89 N. Y. 122; *Kelly v. Leggett*, 122 N. Y., 633; *Traders' Nat. Bank v. Parker*, 130 N. Y., 415; *Israel v. Manh. R. Co.*, 158 N. Y., 624; *Nickell v. Tracy*, 184 N. Y., 386; *City of Buffalo v. D., L. & W. R. R. Co.*, 190 N. Y., 84, 98). ”

Judgment.

Judgment was entered in accordance with the direction of the Referee for \$3,356,938.53, with \$26,633.98 costs, amounting in all to \$3,383,572.51 (*fols.* 820-829).

THE APPEAL.

The appeal is taken from the entire judgment (Notice of Appeal, *fols.* 5-7). The defendant's exceptions to the Decision and the rulings of the Referee upon requests to find or make conclusions of law present for review all of such rulings which are adverse to defendant.

Defendant's Exceptions (*fols.* 754-817).

ARGUMENT.

We shall argue the nine principal questions, or groups of questions, in the case, in the order already proposed, *supra*, pp. 13-25, following, in a tenth chapter of the argument, with a brief discussion of rulings on evidence, some of which—bearing in mind that this is a common law action—are of real importance. It will, we think, be convenient to the Court that, instead of here further stating the facts in the case, we shall, in the argument of each of such principal questions, recapitulate the facts upon which it arises as they appear in the record, and follow them with a discussion of the law.

We begin with the question whether the Referee were right in refusing credit to defendant for conversion expenditure between 14th February and 6th June, 1893. It is true that, although this question involve the greater pecuniary part of the judgment, it does not involve all of it, as do the questions secondly, thirdly, fourthly, fifthly and seventhly discussed. But our order of argument is convenient, because the statement of the facts upon the question of the 14th February-6th June expenditure will best put the facts of the controversy before the Court.

FIRST PRINCIPAL QUESTION.**Defendant's Conversion Expenditure—
14th February to 6th June, 1893.**

The amount of this expenditure, as found by the Referee in findings Eighth at *fol.* 737 and A-2 at *fol.* 534, was "as much as \$1,456,935.28"; and in findings A-34 and A-35 at *fol.*s. 558, 559, he increased the amount by \$24,122.30 for generators, making the total \$1,481,057.58, as stated in finding A-75 at *fol.*s. 628-629. And, for the argument of this *First Principal Question*, we shall assume that figure. The Referee found the balance of proceeds of stock and bonds (not including the \$6,000,000 of stock and bonds) applicable to conversion on 14th February, 1893—that is to say, the amount of defendant's capital not expended on conversion or other construction at the beginning of the period—to be \$500,354.35 (Finding Ninth, *fol.* 738). The portion of this sum which, if the Lease were for that purpose deemed to go into effect on 14th February, 1893, would be applicable under Art. IV of the Lease to conversion to be made thereafter, over the new \$6,000,000 under Art. V, is shown below (pp. 70-71 of this brief, *infra*), as deduced from other findings, to be \$203,884.57. After 14th February, 1893, defendant received as proceeds of real estate, old material, etc., the additional sum of \$259,179.83 (finding A-37, at *fol.*s. 562-563); so that the amount applicable to conversion after 14th February, 1893, over the \$6,000,000, was no more than \$463,064.40. The principal sum involved in this First Principal Question is, therefore, "as much as" \$1,017,993.18 (\$1,481,057.58 less \$463,064.40) out of the \$1,740,258.38, the principal of the recovery, with interest. The question involves, therefore, considerably more than one-half of the total judgment.

The ruling of the Referee upon this large question produces the result that, although defendant's expenditure in conversion actually done after 14th February, the date when the agreement was made, and before 6th June—that is to say, when the minds of the parties met by the ratification of their stockholders—amounted in the net to at least so large a sum as \$1,017,993.18—and was an expenditure which, to that extent, was the very expenditure, and for the very purpose, which, according to the agreement, plaintiff was to get, and defendant was to give—an expenditure which, in substance, enured solely and fully to plaintiff's benefit—nevertheless that outlay is not to be credited to defendant as an expenditure in pursuance of the Lease, but that every dollar of it is to be a dead loss to defendant. And this really enormous result is to follow for no other reason than that the work was done a few weeks earlier than, according to the text of the agreement as interpreted by the plaintiff and the Referee, it was stipulated to be done. Now, does the law require that result? Does so immaterial a deviation from the contract requirement, if such it were, although acquiesced in by plaintiff and agreed to by all of its stockholders, call—and without any other supporting considerations of law, equity or justice—for a judgment transferring this great sum, with interest for sixteen years, from defendant's pocket to plaintiff's?

Exceptions specially presenting the Question :

This first question is more specifically raised upon this appeal by—

1. Defendant's exception (*fol.* 766) to each and every part of the second conclusion of law in the Decision (*fols.* 742–743) that—

“defendant is not entitled to deduct
“from the proceeds of the \$3,000,000 of

“ stock and \$3,000,000 of bonds * * *
“ the moneys expended by it * * *
“ prior to June 6th, 1893, in converting
“ its railroad into an electric railroad.”

2. Exception (*fols. 767, 768*) to each and every part of the sixth conclusion in the Decision (*fols. 744, 745*) that plaintiff is entitled to judgment for \$1,740,258.38 and interest, such sum having been reached by excluding the 14th February-6th June expenditure.
3. Exception (*fol. 805*) to the refusal to make the conclusion in defendant's request 1 (*fol. 632*) that—

“ the amounts expended by the defend-
“ ant in payment of the cost of conversion
“ * * * between February 14th and
“ June 6th, 1893, are to be credited to
“ the defendant on account of its obliga-
“ tion to expend the Six million Dollars
“ mentioned and referred to in Article V
“ of the lease.”

4. Exception (*fol. 817*) to the refusal to make the conclusion in defendant's request A-1 (*fols. 650, 651*) that—

“ the amount expended by the defend-
“ ant in payment of the cost of conversion
“ * * * between February 14th and
“ June 6th, 1893, are to be credited to the
“ defendant on account of its obligation
“ under Articles IV and V of the lease to
“ use, apply and expend moneys in pay-
“ ment at the request of the lessor of the
“ cost of converting the railroads * * *.”

The appellant submits that the facts found by the Referee are quite sufficient to establish his errors in refusing the conclusions asked by appellant and in making the conclusions asked by plaintiff and in rendering the judgment appealed from.

Appellant submits further, however, that its requests Nos. 13 and 14 for findings of fact on this subject of the February-June expenditure should have been granted (*fol.* 334, 335); and that its exceptions to such refusals at *fol.* 788, 789 are valid. Request 13 (*fol.* 334) was to the effect that, about 16th February, 1893, which was the day after the Markey injunction was served (Finding 8 at *fol.* 329, 330), conversation was had between defendant's president and the bankers Hollins & Co., then owners of plaintiff's entire capital stock; and that it was then decided that it was for the interest of all parties that defendant should continue the conversion work without interruption. The Referee found that such a *conversation* was had, but refused to find that a *decision* was made. And he refused entirely the proposed finding that at such consultations it was *agreed* that the moneys expended by the defendant in payment of the cost of conversion after February 15th, 1893, should be credited upon the \$6,000,000 fund. These rulings on matter of fact, we shall, we think, show to have been against ample, credible and uncontradicted evidence (*infra*, pp. 75-81).

Facts [*First Principal Question.*]

The negotiation for the Lease contemplated such an intimacy between plaintiff and defendant and identity of their stockholders as would be implied in the acquisition by the defendant's stockholders of \$27,000,000 out of \$30,000,000 in par of the capital stock of the new Traction Company which was to own, and which almost at once came to own, the entire capital stock of the plaintiff.

Finding II at *fol.* 656 ; finding XIII at *fol.* 667, 668 ; finding 3 at *fol.* 297, 298.

And the Referee found (No. 45 at *fol.* 379) that, as late as in August, 1894, the two companies were "controlled by substantially the same interests" and set of men."

Defendant had, since July, 1892, been engaged in the conversion of its railroad into an electric railroad; and the work was in active progress from that time until the making of the Lease on 14th February, 1893.

Finding 12 at *fols.* 333-334; finding 6 at *fol.* 324.

Plaintiff proved that defendant's total conversion expenditure prior to 14th February, 1893, was at least the sum of \$1,823,102.92.

Plaintiff's exhibit 1448, *fols.* 8172-8553.*

* This exhibit was defendant's bill of particulars, adopted and made evidence by plaintiff, although plaintiff sought to disprove or correct some figures. But as to conversion expenditure charged on defendant's books, prior to 14th February, 1893, we do not find that any correction was sought; and indeed, they represented an incorrectly small amount of expenditure for that period, which, as we shall show in our discussion of the *Seventh Principal Question*, ought to be much increased. The figure of \$1,823,102.92 given in the text above is made up of:

<i>Exhibit A</i> —"Construction Account" items from 5th July, 1892, to 31st January, 1893 (<i>fols.</i> 8172-8213) amounting to \$188,601.13, supplemented by the few items from 31st January, 1893, to 8th February, 1893 (<i>fols.</i> 8214-8216) amounting to \$4,337.08, and together being.....	\$192,938.21
<i>Exhibit B</i> —"Real Estate" items from 2nd July, 1892, to 8th Feb., 1893 (<i>fols.</i> 8293-8403), amounting to \$901,770.74 supplemented by the few items on 8th and on 9th February, 1893 (<i>fol.</i> 8404), amounting to \$11,933.49 and together being.....	913,704.23
<i>Exhibit C</i> —"Equipment Account" items from 1st July, 1892, to 31st January, 1893 (<i>fols.</i> 8502-8523), amounting to \$522,103.11, supplemented by the few items on 31st January, 1893, and on 8th February, 1893 (<i>fol.</i> 8523), amounting to \$74,473.69, and together being.....	596,576.80
<i>Exhibit D</i> —"Extraordinary Expenditures on Account of Electricity" from 5th July, 1892, to 24th January, 1893 (<i>fols.</i> 8536-8552) amounting to \$118,011.49, supplemented by the few items on 31st January, 1893, and 8th February, 1893 (<i>fols.</i> 8552-8553) amounting to \$1,872.19, and together being.....	119,883.68
	<hr/> \$1,823,102.92

From June, 1892, until delivery of possession under the Lease to the plaintiff on 6th June, 1893, defendant did no work of construction, except only for such conversion.

Finding 28 at *fol.* 343.

The doing of the conversion work kept defendant's railroads in an

“upset condition, so as very much to interfere with public travel; power-houses were in progress of construction and the defendant was in the midst of very heavy work in converting its railroads into an electric which required day and night to cover.”

Finding 12 at *fol.* 333, 334.

It was at that time that Hollins & Company, bankers, representing a Syndicate, opened with defendant the negotiation for the Lease. The Syndicate claimed to own the entire capital stock of plaintiff (Finding II, at *fol.* 654). In fact, however, all of that capital stock was, on and before 14th February, 1893, the date of the Lease, owned by Hollins & Co. themselves, who continued to own it until about 17th April, 1893.

Finding 11 at *fol.* 333; finding A-38 at *fol.* 564.

In December, 1892, in behalf of the Syndicate which was represented by the New York Guaranty & Indemnity Company (which we shall call the Guaranty Company), Hollins & Co. presented to defendant's directors a proposition substantially as follows :

Finding 3 at *fol.* 292-302; finding II at *fol.* 654-658.

- (a) Defendant's lease of its railroad property to a street surface railroad company (*fols.* 295, 655);
- (b) The "guarantee by the lessee of 10 per cent. dividends on the stock" of the defendant (*fols.* 295, 655);
- (c) The deposit in a trust company of a guaranty fund of \$4,000,000 (*fols.* 295, 655);
- (d) The lessee to pay all fixed charges of defendant, including interest on bonded debt and all taxes, assessments and license fees, and also the expenses of keeping up its organization, maintenance of suitable offices, etc. (*fol.* 296);
- (e) The surplus in defendant's treasury to be "divided in due time among the stockholders" (*fols.* 299, 657);
- (f) The Syndicate to give such stockholders—
 "the right to purchase three shares of
 "a Traction Company's stock, of the par
 "value of \$100 each, for every ten shares
 "of the par value of \$10 each, held by
 "the Stockholders" of defendant "at
 "the date of the delivery of the lease, at
 "\$15 per share * * *"—

such Traction Company's capital stock being fixed at \$30,000,000; and to

"place in the Stockholders of the
 "Brooklyn City Railroad Company nine-
 "tenths of the capital of the Traction
 "Company, the remaining one-tenth will
 "be allotted to the members of the Syn-
 "dicate but shall be paid for at the
 "same rate as that purchased by the
 "Stockholders of the" defendant (*fols.* 296-298, 655, 656);

and the right to defendant's stockholders to make such purchase to continue sixty days after the ratification of the Lease by such stockholders (*fols.* 300, 658).

On 6th January, 1893, defendant's directors issued to its stockholders a written circular in

which they set forth the foregoing proposition, and stated that they were—

“unanimously of the opinion that the
“proposition is a most favorable one and un-
“hesitatingly recommend it to the Stock-
“holders of the company” (*fol.* 301).

We ask the Court to observe at the outset that, so far as defendant's stockholders were concerned—without whose ratification the transaction could not have taken place—the *two fundamental propositions* were—

- (1) The guaranty to them of ten per cent. dividends, and
- (2) The division among them of the surplus in defendant's treasury,

with the assurance of those two results to them, not only by their landlord interest in the property leased but by the \$4,000,000 guaranty fund and by the plaintiff's obligation to meet all fixed charges, taxes, assessments, fees and organization expenses of defendant. If the assurance of the right to subscribe for the Traction Company's stock were another inducement, it was subordinate and ancillary; it called for new and speculative investment by defendant's stockholders and might or might not be attractive to them.

On 12th December, 1892, the proposition was accepted by defendant's directors, subject to the approval of its stockholders (finding III at *fol.* 658). In the circular of 6th January, 1893, defendant's directors advised its stockholders that the Lease would need approval by the owners of two-thirds of the stock voting at a stockholders' meeting (*fol.* 301). The circular was issued at the time of, and accompanied by, a formal notice to the stockholders of the proposed meeting to be held on the 15th of February, 1893 (finding IV at

fol. 658-659; finding A-6 at *fol.* 536); and the circular was issued with the knowledge, and without the disapproval, of Hollins & Company (owners of all the shares of plaintiff's stock) and of the plaintiff itself.

Finding A-7 at *fol.* 537; finding A-66 at *fol.* 620.

On 15th February, 1893, the proposition so set forth in the circular and the Lease, proposed in the very form in which it was executed, were approved by the stockholders, the Lease having been—

“ formulated by parties representing Hollins & Company, bankers, and by the plaintiff and the defendant.”

Finding VI at *fol.* 660; finding VII at *fol.* 661; finding V at *fol.* 659, 660; finding 4 at *fol.* 302.

It is very clear that the Hollins proposition and the Lease made—so far as defendant and its stockholders were concerned, and as Hollins & Co. and plaintiff understood—a single transaction—the consideration to defendant and to defendant's stockholders for the Lease being not only the stipulations of the Lease itself, but the provisions of the Hollins proposition. Upon the trial this appears to have been the view of both parties; and that view was definitely adopted by the Referee in the findings already cited, made upon the request of plaintiff as well as of defendant. Now, at that time—that is to say, on 15th February, 1893, when the lease had been duly authorized by the stockholders, executed in duplicate and acknowledged (finding V at *fol.* 659, 660; complaint at *fol.* 15 and 16)—defendant's conversion work was in full progress; the condition of its railroads “upset * * * so “ as to very much interfere with public travel,” its

power houses "in progress of construction," and the defendant "in the midst of very heavy work in "converting its railroads * * * which required "day and night to cover" (finding 12 at *fols.* 333, 334). The Referee found (finding 17 at *fol.* 336) that

"The continuance of said work of converting the demised railroads into an electric railroad was to the benefit and advantage of the plaintiff."

NOTE: The Referee added to the finding—but it is difficult to perceive on what basis—that it was also to the advantage of the defendant. As the defendant had just executed a lease of the property under conversion for 999 years, it is obvious that the advantage to defendant, if the Lease were carried out, was merely nominal, except as defendant was meantime, under the Lease, to receive some return by reason of the cost of so continuing the work.

Plaintiff argued below that, upon the facts of the transaction, some delay in the effectuation of the Lease was contemplated by the parties; that the \$4,000,000 deposit had to be made; that the money for it would to some extent be provided by the subscriptions made by defendant's stockholders to the Traction Company's stock. Defendant does not need to controvert that argument, although it is to be noted that such delay was delay merely incident to the convenience of plaintiff and the Traction Company and in no way incident to the convenience of defendant. For, obviously, defendant itself was not to contribute to the \$4,000,000 security which was to come to itself. And there was no obligation whatever on the part of the defendant or of its stockholders to provide subscription for a single share of the Traction Company's stock; their right was merely an option,

Plaintiff will argue—erroneously as we shall contend—that the provision of the Lease (Art. XLVII, at *fol.* 132–134) which called for a further agreement between the respective boards of directors of the plaintiff and defendant as to the time and terms of delivery of the Lease *to the lessee*, made it possible for either party to prevent carrying it out. Nevertheless the facts remain that it had been approved by the stockholders of both companies, and that the only conditions for carrying it out which appear to have been in the minds of any of the parties were plaintiff's provision of the \$4,000,000 guaranty and of the right to defendant's stockholders to subscribe for the Traction Company's stock, both of which matters were in the control of the plaintiff and the Traction Company and neither of which involved, of itself, any delay whatever unless delay resulting from plaintiff's own fault or inability. The moment that plaintiff should deposit the security, it could enforce delivery of possession under the Lease. *The contingent provision for delay was strictly and solely for defendant's protection* against being required to surrender possession until the \$4,000,000 security was actually deposited, and until its stockholders were assured their subscription rights in the new holding company. That company had been incorporated on 7th March, 1893, under the control and by the procurement of Hollins & Company, representing the Syndicate including the Guaranty Company (finding VIII at *fol.* 661; finding A–29 at *fol.* 556).

Whatever other reasons for delay in the effectuation of the lease there might have been, there arose, however, a specific temporary obstacle, in a preliminary injunction procured by Joseph B. Markey, a stockholder of defendant, enjoining the defendant

“ from transferring or setting over * * *
 “ any of the property, franchises, assets or

“ effects of the said Brooklyn City Railroad
“ Company or from surrendering possession
“ of the same to the said Brooklyn Heights
“ Railroad Company * * * ” (*fol.* 327),

and enjoining the plaintiff

“ from taking possession of any of the prop-
“ erty, franchises, assets or effects of said
“ Brooklyn City Railroad Company, or
“ from in any way interfering with the oper-
“ ation, management or control of the same
“ * * * ” (*fols.* 327–328).

The suit was brought against both plaintiff and defendant (finding 7 at *fol.* 325), and was as much in the control of plaintiff as of defendant. The injunction was served upon the plaintiff on 14th February, and upon the defendant on 15th February, and either of them could have moved to vacate it. The Court will observe that it did not prevent the execution, ratification or delivery of the Lease, but only actual delivery and acceptance of possession of the property thereunder. The Lease had been authorized by their boards of directors and their stockholders and executed in duplicate; and this had been done under and as part of the bargain set forth in the circular of 6th January, 1893. The Referee found, upon plaintiff's request, that Markey's injunction action was upon a complaint not showing any request to defendant's directors, or that, if requested, they would refuse to take action (finding XIV, *fols.* 668, 669). That is to say, that complaint failed to show a cause of action. And the present plaintiff's suggestion below seemed to be that the injunction order could be disposed of at any time, and that delay in consummation of the Lease by actual change of possession was incident only to its own delay in depositing the \$4,000,000. According to the findings (12 at *fols.* 333, 334; 13 at *fol.* 334; and 17 at *fol.* 336) the road was disturbed

by the new construction, and it was concededly to the interest of whomever was to operate it that the work should be completed at the earliest possible moment.

Such then was the situation in which the parties found themselves on 15th February, 1893.

But such was not the entire situation. The financial position of the defendant has also, and seriously, if not decisively, to be considered. The findings of the Referee enable us accurately to summarize this part of the situation as it was presented by evidence approved by plaintiff and as the Referee decided it to be. We here take, not the figures proved by us in the "yellow sheet" and otherwise on the trial, but the plaintiff's own figures. We disregard in the summary defendant's evidence proving, beyond a doubt, the fact of a large further expenditure for conversion, which, in defendant's ledger, was not yet charged against construction, but still remained charged against operation. On this account they were not allowed for by the Referee; and, although we shall confidently argue for their correctness later on (*infra*, pp. 297-336), we shall, for the present, ignore them. We first give as to defendant's pecuniary situation a—

Statement as of 14th February, 1893, according to the findings :

Total cost of property (finding A-76 at <i>fol.</i> 631), including \$1,823,-102.92, cost of conversion done by defendant since 1st July, 1892 (<i>supra</i> , p. 60).....	\$12,424,645.65
Moneys, credits and securities on hand (finding A-11 at <i>fol.</i> 541).....	824,070.28
Supplies (finding A-50 at <i>fol.</i> 606)..<	439,264.36
Additional but unpaid cost of railroad (finding A-12 at <i>fol.</i> 542)..<	254,104.18
Unpaid cost of generators (finding A-35, at <i>fol.</i> 559)	42,335.60
	<hr/>
	\$13,984,420.07

Less Debts :

Stock (finding 2, at fol. 291).....	\$9,000,000.00	
Bonds (finding 2, at fols. 291, 292, and A-39, at fols. 564, 565).....	3,925,000.00	
Conversion (find- ing A-12, at fol. 542)	254,104.18	
Conversion gene- rators (findings A-12, at fol. 542; A-34, at fol. 558, A-35, at fol. 559)	42,335.60	
Operation (finding A-12, at fol. 542)	108,040.01	
Accrued interest, rentals and taxes (finding A-13, at fols. 542, 543) ..	49,813.59	
Funds held in trust for repair of Pal- metto St. Sewer and unredeemed tickets (fols. 4309, 4310)	2,187.50	13,381,480.88
Actual Surplus,		\$602,939.19

NOTE: The finding as to the item "Sup-
plies" is not that the value of supplies on
hand was \$439,264.36, but that that was the
amount with which defendant's Supplies Ac-
count was charged, and that there was no
other evidence of the amount of the supplies
then on hand. About four months later, on
6th June, 1893, the actual amount on hand
was ascertained to be \$251,335.59 (finding
XXXIV at fol. 688). The actual value of
supplies on hand on 14th February, if not
\$439,264.36, was somewhere between \$251,-
335.59 and that sum; so that any possible
correction of the supplies item would leave a
substantial surplus.

The meaning of the foregoing statement of defendant's financial situation on 14th February, 1893, is clear and free from bookkeeping technicality. Defendant had floating assets sufficient to pay all of its floating debt, including the unpaid debt of \$296,439.78 incurred for capital investment already made in the railroad, and to make up by a further capital investment of \$203,914.57* the full investment in construction of the total amount, fully paid at par, of the \$9,000,000 of stock outstanding and \$3,925,000 of bonds then outstanding, and over and above to provide an actual surplus—and whether the amount of that surplus were \$602,939.19 or a greater or a lesser amount, is immaterial. For all such surplus, whatever its amount, was, by the terms of the agreement, to go to defendant's stockholders. Defendant's financial situation on 14th February, as shown by such statement had, as we shall later on fully show, a strong bearing on what the Lease contract then meant to both parties. The cash or quick assets on hand on 14th February, 1893, were, according to the figures just given—

*FOOT NOTE.—Adding to the payments already actually made for construction as given above of..... \$12,424,645.65
the further investments when there should be paid
the debts already incurred for conversion..... 254,104.18
and for conversion generators..... 42,335.60

we have a total for past construction of..... \$12,721,085.43
Total par of outstanding bonds and stock.. 12,925,000.00

Balance applicable to *new* construction \$203,914.57

The same figure is obtained by deducting from the amount of existing capital applicable to construction as found by the Referee (Finding Ninth at *fol.* 738)..... \$500,354.35
the sum of unpaid conversion debt \$254,104.18
and unpaid debt for generators—a con-
version expense..... 42,335.60 296,439.78

\$203,914.57

Moneys, credits and securities on hand	\$824,070.28	
Supplies	439,264.36	
<hr/>		
Total cash assets on hand.	\$1,263,334.64	
Debts :		
Conversion....	\$254,104.18	
Generators....	42,335.60	
Operation....	108,040.01	
Accrued interest and taxes.....	49,813.59	
Palmetto St. sewer and unredeemed tickets.....	2,187.50	456,480.88
<hr/>		
Net cash assets on hand.....	\$806,853.76	
Deducting surplus	602,939.19	
<hr/>		
Leaves net of cash assets on hand available for future work in conversion.....	\$203,914.57	

Even if the figure of \$439,264.36 for supplies on hand were reduced, the amount of the net cash assets on hand so available for conversion on 14th February, 1893, would not be altered at all from the \$203,914.57 figure, since the amount of *surplus* (which, under Art. IV, had to be deducted from cash assets to reach the *net* assets so available) would then be correspondingly less.

The whole of such sum of \$203,914.57, and much more, that is to say—\$1,481,057.58—was in fact expended by defendant under the obligation of the Lease in conversion work done after 14th February, 1893. So that on 6th June, 1893, when plaintiff took possession such available sum and all of its surplus, and a large amount besides which was represented by floating debt, had been expended. As we shall show (*infra*, p. 93), the result was that, while Art. IV of the Lease provided as of 14th February, 1893, when the parties reached their agreement, a large sum for conversion, so that that article had really a substantive

meaning and effect, on the other hand, when possession was delivered on 6th June, 1893, then—on plaintiff's argument that the conversion provision of the Lease became operative only on that day—Art. IV was meaningless and useless—indeed worse, a mere trap. So it is that plaintiff in its complaint absolutely ignores Art. IV of the Lease.

To this subject we shall later return. What we here wish to make clear is that, if, after 14th February, 1893, and before 6th June, 1893, the defendant were to make a capital expenditure, which was valueless to the defendant itself and to its stockholders, in an amount far exceeding the surplus, then the result would be the loss of the surplus to defendant and its stockholders in contravention of the agreement and the production of a deficit or debit balance to profit and loss. Or in other words, the ten per cent. dividends assured by the agreement to defendant's stockholders would have to be reduced to provide the debt thus created. Nothing can be plainer than that, if any capital expenditure were to be made after 14th February, 1893, it must be represented by property paying an income sufficient to meet the interest charge on the bonds, and the ten per cent. dividends on the stock, issued to provide the money. Just as the \$1,823,102.92 which defendant had already on 14th February, 1893, the date of the Lease, spent for conversion since 1st July, 1892, was concededly to be represented by stock or bonds or both, the dividends and interest on which were assured by the agreement—and as expenditure after the Lease should take effect (which date turned out to be 6th June, 1893) was concededly to be represented by newly issued bonds, the interest on which plaintiff was to pay—so the like expenditure for the same purpose between 14th February and the date the Lease should take effect (6th June) must be derived

from, and represented by, securities, the dividends or interest on which plaintiff was to pay. Any other result—it is thus demonstrably clear—would be a perversion and prostration of an essential and even fundamental element of the agreement.

For, we repeat, and shall repeatedly ask the Court to remember, that the truly fundamental purposes of the agreement of 14th February, represented by the Lease and the Hollins proposition, both ratified by defendant's stockholders on 15th February, 1893 (*supra*, pp. 61–64), were to assure the defendant's stockholders annual dividends at the rate of 10 per cent., and a division among them of the surplus. No further expenditure for conversion or any other construction—that is to say, no “capital expenditure”—could be made by defendant, unless (1) it were represented by the creation of a corresponding asset of income paying value equivalent to the capital expenditure, or unless, on the other hand, (2) the capital and surplus were to be impaired with the result of establishing an interest charge, impairing and reducing the proposed guaranteed dividends at the rate of 10 per cent. This result is obvious and is illustrated by the temporary reduction of its dividend rate made by defendant after this judgment was recovered to provide to a relatively small extent against the contingency, which we venture to think is remote, that this Court should affirm the judgment. The defendant, as shown (*supra*, pp. 26–29), was to be left by the provisions of the Lease with no available property during the term of the Lease except

1. Its surplus which was to be divided among its stockholders ;
2. The right for 999 years to receive 10 per cent. annually on its capital; and
3. Its franchise to be a corporation, the expense of maintaining which plaintiff was, under Art. XVI of the Lease, to provide during the term of the Lease.

And, as a corollary, it is obvious that a mere increase of the *corpus* of defendant's property by construction work—there being no increase of rental to be paid according to the Lease—would make in reality no increase whatever to *defendant* or its stockholders of the value of the railroad property. For, if the Lease were carried into effect, the entire property, including the new conversion work, would go into the sole possession and sole use of the plaintiff and there remain for 999 years, and without, during that period, any imaginable advantage whatsoever to defendant or its stockholders, unless in income earned from it. That this elementary financial situation was, in February, 1893, obvious to the experienced business men in charge of the transaction, is not to be doubted.

Not only did the Court below find (finding A-75 at *fol.* 628) that, during the period, 14th February to 6th June, the defendant did \$1,481,057.58 worth of conversion work, but the finding also was that, in large part at least, defendant's work was done with money borrowed prior to the issue of its new securities (finding 35 at *fol.* 359).

And the finding further was that it did this work "with the knowledge of the officers and directors of "the plaintiff company" (finding 16 at *fol.* 336); that Hollins & Company, who were then owners of the entire capital stock of the plaintiff and who had controlled and conducted the negotiations with defendant which resulted in the Lease, knew of the performance of the work, and that no objection was made by either plaintiff or Hollins & Company to such performance (finding A-51 at *fol.* 607—Hollins & Company's ownership of plaintiff's entire capital stock being stated in finding A-38 at *fol.* 564). So the Court found that, when plaintiff took possession of defendant's railroads on 6th June, 1893, it accepted them "without objection to the "construction and conversion work" which had been done (finding A-65 at *fol.* 620).

Remembering now that \$1,481,075.58 worth of work was worth that full sum to the plaintiff when it took possession of the railroads, and for 999 years (less only the microscopic value of defendant's mere reversion at the end of that term) it is submitted that the facts already stated which were found by the Referee permit no other conclusion than that the plaintiff understood that it was to accept—and intended to accept—the work done as in satisfaction *pro tanto* of the obligation of defendant under Articles IV and V of the Lease as to defendant's payment of the cost of conversion work. No other evidence, it is submitted, was necessary to establish that as the understanding of the parties. Or, if any such evidence were necessary, we shall argue (*infra*, p. 101) that the Court would lay hold of even slight testimony to establish an agreement the probability of which was so nearly conclusive. But, in fact, ample and uncontradicted evidence of such an agreement was given by defendant. The Referee, it is true, while finding (finding 13, at *fol.* 334) that, on or about 16th February 1893—that is to say the day after the service of the Markey injunction—

“ conversation was had between said
 “ Hollins & Co., the then owners of the
 “ entire capital stock of the plaintiff, and
 “ the president of the defendant, that it
 “ was for the interest of all parties that the
 “ work of conversion should be continued
 “ * * * ”,

refused (*fol.* 335) defendant's request 14 to find that it was then—

“ agreed that the moneys expended by the
 “ defendant * * * should be credited to
 “ the \$6,000,000 fund * * * .”

Since, as the Referee found, there was, before defendant did the work, conversation * * *
 “ that it was for the interest of all parties that the

“work of conversion should be continued”, and since, immediately after such conversation, defendant with plaintiff’s knowledge and without its objection, proceeded with the work which plaintiff thereupon accepted (findings 16 at *fol.* 336 ; A-51 at *fol.* 606 ; A-4 at *fol.* 535)—we submit that the agreement was in effect found by the Referee, even if he did thus refuse specifically to find the agreement. The refusal, we submit, was not only against the weight—the overwhelming weight—of evidence, but against the entirely uncontradicted evidence.

Bernard J. Burke, a member of the Hollins firm, upon this testified as follows :

“My firm originated the scheme for acquiring the railroads and the tramways
 “* * * at least so far as the Brooklyn
 “City Railroad was concerned, and converting them into electric rather than
 “horse power. In furtherance of that
 “scheme in 1893 we bought the stock of the
 “Brooklyn Heights Railroad Company, at
 “about that time or before, and held it,
 “every share of it (*fols.* 5224, 5225).
 “* * * I recall the service of an injunction in what was known as the
 “Markey case, very well. * * * As I
 “recall it, in Brooklyn, in February (*fol.*
 “5234). * * * The condition of the
 “work of conversion * * * was in its
 “early stages, it couldn’t have been far, as
 “we were expediting the work at that time.
 “Certainly we had a conversation with Mr.
 “Lewis, the president of this road, in respect
 “to the continuance of work by the Brooklyn
 “City Railroad Company after the service of
 “the Markey injunction, on that day. * * *
 “There was a general conversation, discussion of the situation at that time, and
 “we were all anxious that the work should
 “be proceeded with and with no delay—it
 “was fourteen years ago—it is very difficult to state exactly; all I remember is the
 “substance, the language is a different
 “thing. The substance was, Mr. Lewis
 “should proceed with the construction for

“ our account, that is, the Long Island
“ Traction, The Brooklyn Heights, that was
“ the substance of the instructions, I under-
“ stand (*fols.* 5235-5237). * * * Q. What
“ request did you make of him, if any?
“ A. That he proceed with the work of re-
“ construction. I mean by that the conversion
“ of the road from horse to electricity. The
“ work we were then engaged in, being the
“ work of conversion, from a horse railroad
“ to an electric (*fol.* 5239). * * * *By*
“ *the Referee*: Q. What representative of
“ your firm was present besides yourself?
“ A. Mr. Hollins undoubtedly, if I remem-
“ ber, and Mr. Lowery who represented us
“ * * * Grosvenor P. Lowery; I think Mr.
“ Auerbach was there. Q. Did you or any of
“ those people who represented you make a
“ request in substance that this man proceed
“ with the work? A. Unquestionably (*fols.*
“ 5243, 5244). * * * There was a general con-
“ versation between Mr. Hollins, Mr. Lowery,
“ Mr. Lewis and myself, and some other as-
“ sociates were present, who they were I don't
“ know, and it was on this very question
“ as to what should be done during the
“ period of this injunction, and it was de-
“ cided among us that the work should be
“ proceeded with (*fols.* 5245, 5246). * * * Q.
“ Can you give me from memory the sub-
“ stance of your interview * * * ?
“ A. It was that the work be proceeded
“ with by the City Railroad people *out of the*
“ *funds which were to come to us.* * * *
“ My recollection is I was in daily touch
“ with the construction of this railroad. I
“ kept, I remember, in pretty close touch
“ with it. I did not attend personally to
“ the construction of the road. I think
“ we approved contracts for the work. I
“ have been a partner twenty years or more
“ in the firm of Hollins & Co. I still am ”
(*fols.* 5248, 5249, 5252-5253).

Harry B. Hollins, the head of the banking firm, testified :

“I was the author or representative
 “of a syndicate in 1892 or 1893 that
 “proposed to purchase the tramways
 “of the Brooklyn City Railroad Com-
 “pany (*fol.* 5274). * * * There was an
 “injunction upon the Heights Company by
 “one Markey against the carrying out of
 “the lease. There was some time necessary
 “after the execution of the lease for the put-
 “ting up of the four million dollars securities
 “(*fol.* 5276). * * * That was the basis
 “of the conversation, that we didn’t want
 “any interruption to occur, and after several
 “interviews it was, as I remember, *agreed*
 “*that the work should continue* * * *
 “He (Lewis) said that it was unquestionably
 “desirable that the work should proceed,
 “that we had already electrified a certain
 “amount of the lines, and of course the
 “results were very apparent what it would
 “be on the whole system, and every hour’s
 “delay meant a loss of thousands and thou-
 “sands of dollars to us (*fols.* 5278-5279). * * *
 “Q. Is it not a fact that as rapidly as the con-
 “version from horse to electricity was made
 “there was a great increase in the revenues
 “of the company arising out of public
 “travel? A. There was a great increase.
 “I was aware of that fact at the time
 “(*fol.* 5280). * * * I called Mr. Lewis’
 “attention to our connection with other
 “traction companies where they had changed
 “the motive power from horse to electricity,
 “and gave him the comparative percentage
 “of increase, showing the advantage of
 “having the work proceed as quickly as
 “possible, and the showing in Brooklyn
 “where we had already made some changes.
 “I emphasized the fact that it was our
 “desire to proceed with all possible rapidity
 “(*fol.* 5281). * * * Q. What, if any-
 “thing, did you say to him as to how the
 “expense was to be met * * * ? A.

“ *The Brooklyn City Railway Company were to proceed with the work and receive credit for the money that they expended in construction* ” (fol. 5282).

Daniel F. Lewis, who was then defendant's president, referring to the time of the preparation of the Lease, said :

“ The officers of the Heights Company ” (plaintiff) “ were largely figure heads, as I recall it, and the parties who did that business consisted of the attorneys, counsel of Messrs. Hollins & Company and myself representing the Brooklyn City Company and at intervals we had necessary conferences with our executive officers and Mr. Trull as counsel (fol. 5264). When the Lease was executed it ” (plaintiff's stock) “ was owned by Hollins & Company and their representatives. I recall the service of the Markey injunction. It was made upon me. * * * After the service of that injunction I had a conversation with Hollins & Company, the people who had represented the lessee in this lease, as to what should be done (fol. 5265). * * * These Brooklyn City railways at that time were in a very considerably upset condition * * * and we were in the midst of all that very heavy work which required day and night to cover at that time. It was indispensable to the work of conversion from horse to electricity. These upsets or disturbances of the road were so that they interfered with public travel (fols. 5267-5268). * * * *Hollins and Burke on behalf of the lessee* not only desired the work to be continued, but requested and agreed that such work be continued (fol. 5269). * * * He (Hollins) stated that it was desirable to proceed with the work; *he and I together stated*, as men will on occasions of that kind, *that it would be necessary in order*

“ to continue this work to use the funds of
 “ the Brooklyn City Railroad Company, to
 “ be expended for the purpose, whether such
 “ funds were those then on hand or properly
 “ any other funds which might accumulate
 “ either from the earnings of the Company
 “ or the proceeds of the bonds and stock
 “ to be sold by the Brooklyn City Railroad
 “ Company, as referred to in the Lease,
 “ until possession under the lease could be
 “ effected. I recited generally the work in
 “ progress. I told him the work that was
 “ being done on February 15th, 1893, and
 “ what had been ordered. This was Febru-
 “ ary 16th (*fols. 5271-5272*). * * * We
 “ kept on steadily from February 14th until
 “ June 6th.

“ Q. During that interval were the officers
 “ and directors of the Heights Company or
 “ Hollins & Company aware of the continu-
 “ ation of the work? * * * A. Yes, the
 “ officers were generally familiar. I know
 “ that because I talked with them. They
 “ were over there on the work and in our
 “ office about it at intervals * * *. After
 “ the Heights Company entered into posses-
 “ sion there was no change in the manner of
 “ doing the work generally * * * ” (*fols.*
5303-5305).

Joseph S. Auerbach was counsel for Hollins & Co., and took part in drawing the Lease (*fols. 5654, 5655*). He testified (*fols. 5655-5665*):

“ I remember the approval of the lease by
 “ the stockholders on February 15th, 1893.
 “ I did not fix in my mind the precise date ;
 “ sometime in February, about the middle
 “ of February, yes. There were certain
 “ papers in an injunction suit served upon
 “ either of the companies on that day, I think
 “ upon both (*fol. 5655*). * * * The Brook-
 “ lyn City Company was under an obliga-
 “ tion to construct for its own account if
 “ the lease became ineffective, under the

“ terms of the lease ; and everybody who
 “ was connected with the project, whether
 “ it was the Brooklyn City or the Brooklyn
 “ Heights Company, of course were anxious
 “ and desirous that the work of construc-
 “ tion should be pushed ; interruption of it
 “ was believed to be impossible by every-
 “ body (*fol.* 5659, 5660) * * * My un-
 “ derstanding of the conclusion reached be-
 “ tween the parties was that, *in case the*
 “ *lease became effective, whatever expendi-*
 “ *tures were made between the service of the*
 “ *injunction and the lease taking effect was*
 “ *to be an expenditure made under the terms*
 “ *of the lease for the account of the lessee* ”
 (*fol.* 5664, 5665).

We challenge respondent's counsel to cite any tes-
 timony whatsoever from this record, whether testi-
 mony of others or cross-examination of these wit-
 nesses, tending to impair the credibility of such
 statements of Messrs. Burke, Hollins, Lewis and
 Auerbach, which we have now quoted.

Defendant does not, of course, claim that the en-
 tire amount, \$1,481,057.58, of its expenditure for
 the period, 14th February—6th June, 1893, should
 be allowed it as against the \$6,000,000, the proceeds
 of the new stock and bonds. It will assume—not-
 withstanding plaintiff's complete ignoring of Article
 IV of the Lease—that the amount is to be reduced
 by the moneys in its hands on 14th February,
 1893, which, under that article, would have been
 applicable to conversion if possession had been
 delivered under the lease on that day. The Referee,
 as we have said, found the amount in defend-
 ant's hands on that day applicable to construc-
 tion to be \$500,354.35 (*Finding Ninth, at fol.* 738),
 this being the difference between the par, or \$12,-
 925,000, of defendant's stock and bonds then out-
 standing (*finding A-39, at fol.* 564, 565) and the
 amount of capital expenditure for construction and

conversion theretofore made by defendant, being \$12,424,645.65 (finding A-76, at fol. 631). From such \$500,354.35 there was to be paid, as above stated (p. 70), the debt of \$296,439.78, already incurred for conversion, leaving \$203,914.57 available for new conversion work (*vide supra*, pp. 70, 71). And this was the substance, although not the technical form of the obligation of Art. IV of the lease. Its provision was that defendant's stipulated expenditure fund for conversion over and above the \$6,000,000 par proceeds of the new securities should consist (Lease at fol. 67) of—

“ all moneys, credits or securities on hand at
 “ the date this lease shall take effect, less
 “ the amount required to pay and discharge
 “ the indebtedness, obligations and liabilities
 “ of the lessor as of that date other than its
 “ bonded indebtedness upon bonds issued or
 “ assumed by it, and less the amount of its
 “ surplus earnings diminished by a *pro rata*
 “ amount of accrued interest and accrued
 “ rentals agreed to be paid by the lessor and
 “ a *pro rata* amount of taxes for the cur-
 “ rent year estimated upon the amount of
 “ the preceding year * * *.”

We give in a footnote* a computation based upon

* The Referee found substantially all of the elements as of 14th February, 1893, for the computation prescribed by Article IV of the Lease. He found the amount of “all monies, credits, and securities on hand” on February 14th, 1893, to be \$824,070.28 (finding A-11, at fol. 541). In Finding A-12, at fol. 542, he stated the “indebtedness, obligations and liabilities, * * * other than its bonded indebtedness” to be

For conversion.....	\$254,104.18
For generators bought.....	42,335.60
For operation.....	108,040.01

Making..... \$404,479.79

In Finding A-13, at fols. 542, 543, he stated the *pro rata* amount of accrued interest, rentals and taxes to be \$49,813.59; and there was a further obligation of \$2,187.50 (inadvertently not found by the Referee) for funds held by defendant in trust to repair the Palmetto St. sewer and for unredeemed tickets (fols. 4309, 4310). The Referee did not specifically find the amount of the surplus, which is, however, easily computed at \$602,939.19 over and above such accrued interest, rentals and taxes, as shown *supra*, pp. 68-69. We are thus able to compute the—

the findings of the Referee as to defendant's financial condition on 14th February, 1893, showing, among other things, what was on that date the amount

"CONVERSION" FUND AS OF 14th FEBRUARY, 1893.

"All moneys, credits and securities on hand" (finding A-11 at fol. 541).....	\$824,070.28
Supplies (finding A-50 at fol. 606)	439,264.36
	<hr/>
	\$1,263,334.64

Less:

"Indebtedness, obligations and liabilities, other than its bonded indebtedness "(Finding A-12 at fol. 542).

Conversion,	\$254,104.18
Generators,	42,335.60
Operation,	108,040.01

Accrued taxes, etc.(finding A-13 at fols. 542, 543)	49,813.59
--	-----------

Palmetto Street sewer and unredeemed tickets fund (fols. 4309, 4310).....	2,187.50
--	----------

----- \$456,480.88

Amount of surplus earnings, diminished by <i>pro rata</i> of accrued interest, rentals and taxes as shown above (pp. 68-69)	602,939.19
	<hr/>
	1,059,420.07

Available for Conversion under Art. IV. as of 14th February, 1893.....	\$203,914.57
--	--------------

After 14th February, 1893, the proceeds of sale of certain real estate and other property charged against capital account, other than moneys, credits and securities, were received by the defendant to the amount of \$259,179.83 (finding A-37, at fols. 562, 563; see also findings A-30, A-31, A-32 and A-33, at fols. 556, 557; and finding Tenth in the Decision at fols. 738, 739). Adding this sum to the amount available for conversion on 14th February, 1893, as above stated, we should have a net result of \$463,094.40 as the fund available under the Lease, over and above the \$6,000,000 of new stocks and bonds.

NOTE: As we have pointed out (*supra*, p. 69), it is, of course, possible that the amount of the supplies may have been less than the amount with which defendant's Supply Account was charged. But if \$439,264.36, the amount assumed for supplies in computing the surplus, be erroneous, then the error in unduly augmenting the amount of the surplus is exactly neutralized by augmenting in the same amount, as shown in the calculation set forth above, the amount of the current assets, from which, under the provisions of Art. IV the surplus was to be deducted. Whatever, therefore, was the precise amount of supplies on hand on 14th February, the \$203,914.57 figure representing the amount available under Art. IV for conversion remains unchanged, since the amount of supplies is a factor on both sides of the account.

of the conversion fund as so defined in Art. IV of the Lease in excess of the \$6,000,000 par of new securities and which results in this same figure of \$203,914.57.

If to this amount be added the \$259,179.83 proceeds of real estate, etc., sold after 14th February, 1893, there will be the sum of \$463,094.40 deductible from defendant's expenditure, 14th February—6th June, in order to reach the portion thereof with which defendant should be credited, and there would remain \$1,017,963.18, as the part of the \$1,481,057.58 to be allowed the defendant against the amount payable by it under Art. V of the Lease.

All of this computation, it will be remembered, was ignored by the plaintiff. For, assuming that, as it worked out as of 6th June, 1893, Art. IV of the Lease did not provide any fund for "conversion," plaintiff asserted in its complaint (*fol.* 24) that, when "the Lease took effect" on 6th June, 1893, \$6,000,000, the amount provided by Art. V,

" was the amount which in and by said
 " lease the defendant agreed should be ex-
 " pended by the defendant in payment at
 " the request of the plaintiff from time to
 " time of the cost of converting the rail-
 " roads" * * *

And the Decision of the Referee proceeded upon that basis (*fols.* 739-742). But, for the present argument of this appeal, we suppose it to be immaterial whether defendant's claim for expenditure between 14th February and 6th June should be allowed at \$1,017,963.18, or at some other amount. For, if, as we shall show, the very theory upon which the Referee considered the testimony and found the facts be erroneous, the facts will in any event have to be again found under proper instructions from this Court. If our reasoning

upon this question shall prevail, there must be a new trial.

For use in the argument we give in another footnote* a computation of defendant's surplus—involving a presentation of its financial condition—on 6th June, 1893.

Our facts and figures found by the Referee or asserted or conceded by plaintiff.

In closing the Presentation of the Facts on this question we beg the Court to notice that, in citing figures from the Record, we have taken the figures found by the Referee, being, in every case, as we understand, the plaintiff's own figures; or we have taken other figures proved by plaintiff. And as to all the facts we have taken the Referee's findings, or facts not disputed by plaintiff, except only as to the oral agreement for prosecution of conversion work made between plaintiff and defendant in February, 1893, as testified to by Messrs. Burke, Hollins, Lewis and Auerbach (vide supra, pp. 76-81).

*** DEFENDANT'S SURPLUS ON 6th JUNE, 1893, ACCORDING TO FINDINGS:**

Total cost of railroad property (finding A-75 at <i>fol.</i> 628, 629).....	\$14,009,253.75
Moneys, credits and securities on hand (finding XXIV at <i>fol.</i> 681)..	485,026.65
Supplies (finding XXXIV at <i>fol.</i> 688).....	251,335.59
Unmounted equipments, etc. (finding 21 at <i>fol.</i> 340; <i>infra</i> pp. 330, 331)	\$150,245.79
	<hr/> \$14,895,861.78
Less Liabilities:	
Capital stock (finding A-40 at <i>fol.</i> 565).....	\$9,000,000.00
Bonds issued and outstanding (finding A-40 at <i>fol.</i> 565).....	3,925,000.00
Loans (finding A-41 at <i>fol.</i> 566)....	600,000.00
Conversion debts (finding A-41 at <i>fol.</i> 566).....	271,949.06
Generators (finding A-41 at <i>fol.</i> 566)..	66,457.90
Operation (finding A-41 at <i>fol.</i> 566)..	118,157.49
Accrued interest, rentals and taxes (finding A-75½ at <i>fol.</i> 630)	194,360.50
Palmetto Street sewer fund (<i>fol.</i> 4309, 4310—there being no finding as to this).....	2,187.50
	<hr/> \$14,178,112.45
Surplus of 6th June, 1893.....	\$717,749.33

Upon the Law.

It is greatly to be regretted that we have no opinion from the learned Referee. For, doubtless, it would have set forth the reasoning which brought him to think—notwithstanding the facts which he has found—that such great “conversion” expenditure by defendant between 14th February and 6th June, 1893, should enure solely to the benefit of the plaintiff (except the technical and nominal reversion to defendant after 999 years) and without a dollar of consideration moving from the plaintiff, and that the burden of the expenditure should rest entirely upon the defendant without the slightest benefit accruing to the defendant, except nominally on the reversion after 999 years. We have, however, the elaborate briefs for the plaintiff before the Referee; and they give the following points of reasoning in support of their claim :

1. That the Lease by its terms was not to take effect until plaintiff should make the \$4,000,000 deposit; that such deposit was made on 6th June, 1893, and not before, and possession of the property delivered then, and not until then; that the Lease spoke therefore as of that date, and not of its recited date, 14th February, when it was executed and ratified by the stockholders of both parties; that it called for the issue and sale *thereafter* of the \$6,000,000 of securities whose proceeds were to be applied to electrification, and that, since defendant did not see fit to suspend the electrification from 14th February until the Lease “took effect and “possession was delivered,” its expenditure during the interval must be its loss and plaintiff’s gain.
2. That the Lease not having taken effect until 6th June, 1893, whatever was said or happened between the parties before that date is inadmissible to make the contract different from what was written in it.

3. That, even if the Lease were deemed to have been made on 14th February, when it was dated, reduced to writing, signed, acknowledged and ratified by the stockholders, nevertheless it could not be modified by parol.
4. That Hollins & Company, although the owners of plaintiff's entire stock, did not have the right for it to modify the agreement by consenting to accept, before the date on which plaintiff should take possession, any conversion work or expenditure by the defendant, and that even a complete concurrence of all interested at that time did not operate to modify the written Lease or establish an ancillary agreement or a waiver of strict performance.
5. That any modification of the Lease was void because not approved by votes of the stockholders.
6. That the parties did not, on 14th February, 1893, contemplate that plaintiff should take possession or the Lease go into effect before 6th June, this being shown by the fact that at that time plaintiff had no means of its own to make the \$4,000,000 deposit and that the deposit could not be made until the sale of the stock of the Traction Company which might be delayed for as much as sixty days because the defendant's stockholders had that length of time within which to buy nine-tenths of the Traction Company's stock.
7. And, finally, plaintiff argued that neither its acquiescence, if there were acquiescence—nor its silence—nor its acceptance of the work—nor the enormous loss to defendant, if the understanding should not be held to have been as defendant claimed and the correspondingly enormous benefit to plaintiff, would estop plaintiff to deny the understanding.

Such is plaintiff's contention, as we understand it, which our argument has to meet.

POINT I. [*First Principal Question.*]

The refusal to credit the defendant with its February-June conversion expenditure is a plain perversion of the substantive agreement between the parties.

The Lease must clearly be read in connection with the Hollins Proposal, which, according to the findings, was, with the assent of Messrs. Hollins & Company, bankers, then the owners of all the shares of plaintiff's stock (findings 3 at *fol.* 292-302; A-6 at *fol.* 536; A-7 at *fol.* 537; and 11 at *fol.* 333), put before the defendant's stockholders as the ground upon which they were asked to ratify the Lease—as, indeed, it had been before the defendant's directors when they approved it, as the basis and reason for making the Lease. And such Proposal was expressly approved by the stockholders at the very time when they approved the Lease, and as part of the same transaction. It is, therefore, upon the findings, indisputable that, so far as the defendant and its stockholders were concerned, the following were fundamental and necessary parts of the transaction:

(a) The—

“ guaranty by the lessee of 10 *per*
“ *cent.* dividends on the stock of the
“ Brooklyn City Railroad Company ”

upon a par not exceeding \$12,000,000, which was the amount of the stock then authorized and included the \$9,000,000 already issued and the \$3,000,000 newly to be issued, and, of course, over and above, interest on the \$6,925,000 of bonds.

Hollins' Proposition as accepted by defendant and its stockholders; finding 3 at fol. 295; Lease, Art. XIV, fols. 82-85.

(b) The—

“surplus in the treasury of the Brooklyn City Railroad Company at the date of the delivery of the lease” was to “be divided in due time among the Stockholders of the Brooklyn City Railroad Company.”

Id., fol. 299.

(c) The immediate passage by defendant out of actual railroad business and its existence thereafter—during the period of 999 years—for no other purpose than to receive from plaintiff a revenue equal to the interest upon its bonded debt, which plaintiff covenanted to pay, and dividends for its stockholders at the rate of 10 *per cent.* per annum, and to pay out such revenue to its bondholders and stockholders. And, in order that defendant should have no other business to transact—and so that there should be no practically imaginable pecuniary risks to the 10 *per cent.* dividends—and so that defendant's existence should be continued solely for the business of so paying interest on bonds and the 10 *per cent.* dividends, plaintiff was also, under the Lease, to pay the rentals, organization, franchise, clerical and other expenses of the defendant, to defend all law suits involving the validity of lessor's franchises, rights or easements or its title to any real estate, property or premises covered by the Lease or involving the validity of the Lease itself, and to indemnify the defendant—

“against the expense of the defense

“ of any and all actions which shall
 “ be pending against the lessor on
 “ the date this lease takes effect, or
 “ which may hereafter, during the said
 “ term or the continuance of this lease,
 “ be brought against the lessor for in-
 “ juries * * * or * * * death
 “ * * * against any judgment exist-
 “ ing against the lessor upon like causes
 “ of action on the date this lease takes
 “ effect, or at any time thereafter dur-
 “ ing the continuance of this lease; also
 “ from and against the expense of any
 “ action upon any other cause of action
 “ now pending or which may be here-
 “ after brought against the lessor and
 “ against any judgment rendered in any
 “ of said actions.”

Lease :

Art. I, *fols.* 39, 57-65.
 Art. IX, *fols.* 77, 78.
 Art. XI, *fols.* 79, 80.
 Art. XIII, *fols.* 81, 82.
 Art. XIV, *fols.* 82-85.
 Art. XV, *fols.* 85-87.
 Art. XVI, *fol.* 88.
 Art. XVII, *fols.* 88, 89.
 Art. XXXIV, *fols.* 107-111.

So the Lease put beyond doubt plaintiff's obligation to operate and run the railroads and to maintain, and at the end of the 999 years to restore, the property with all of its franchises (Lease, Arts. XXVII and XXVIII at *fols.* 100-102).

Obviously any expenditure by defendant after 14th February upon conversion would be a capital expenditure; and the agreement carefully provided in Arts. IV and V that such expenditure should come from capital. At that time it had, of capital un-

expended for construction, only the sum of \$500,354.35 which the Referee found to be "applicable to conversion" (finding Ninth at fol. 738). Against this, as we have shown, was \$296,439.78 of unpaid debt for conversion already done. So that the fund, which under Art. IV was available for conversion over and above the \$6,000,000 under Art. V was \$203,914.57 (*supra*, pp. 82-84). Subsequently there was sold property, the receipts from which amounted to \$259,179.83 (finding A-37 at fols. 562, 563). It is obvious that any expenditure by defendant upon conversion in excess of such sums of \$203,914.57 and \$259,179.83, making in all \$463,094.40, ought, as defendant insists; to come from the \$6,000,000 capital provision. Otherwise it must be taken from surplus or must be taken out of the 10 *per cent.* income on the stock. From no other possible place could it come. When plaintiff's counsel were pressed below with this consideration, their answer was this, to quote from their printed reply brief before the Referee (p. 25):

"So far from desiring to collect this just claim by some 'inconceivable process from 'some indiscernible person,' the plaintiff is abundantly able to retain the entire amount out of the quarterly payments due to the defendant, so that the 'process' and the 'person' are both obvious."

That is to say, plaintiff's own position is that the result of the Referee's ruling is the reduction of the dividends payable to the defendant's stockholders below 10 *per cent.* for many years, or a complete suspension of dividends for a shorter term of years.

The contract, as has been shown, definitely appropriated every dollar and item of the defendant's property. Its entire railroad property passed with the lease (fols. 57-63), whether actual railroads,

real estate or other immovable or personal property, including—

“all and every franchise, right, privilege
“and easement of whatsoever kind or nature
“now owned, possessed, or exercised by
“said lessor, or which may hereafter be ac-
“quired by it * * *.

“Also all horses, harness, cars, loco-
“motives, engines, tools, implements, ma-
“chinery, railroad equipments, power sta-
“tions, electrical appliances and equip-
“ments, stable equipments and fixtures,
“office furniture and office fixtures, and
“all other property of whatsoever kind
“or nature except money, credits and se-
“curities, acquired, owned or possessed by
“said lessor for use in the construction,
“maintenance or operation of said demised
“railroad or railroads and properties (Lease,
“*fols.* 62, 63).”

Supplies on hand were to be taken by the lessee and paid at cost (Lease, Art. XI, *fols.* 79, 80). The excepted property—that is to say, defendant’s “money, credits and securities”—was, according to the agreement, to be applied—

1. To pay the defendant’s floating debt (Lease, Art. IV at *fols.* 67-69);
2. To distribute defendant’s surplus to its stockholders (Lease, Art. IV at *fol.* 67; Hollins Agreement in finding 3 at *fol.* 299); and
3. To apply the remainder to conversion. Defendant’s further contribution to conversion under Art. V was to consist only of the amounts received by it up to par on the \$6,000,000 of its new stock and bonds.

Lease, Arts. IV and V, at *fols.* 67-72.

As against \$12,721,085.43, the cost of the railroad property on 14th February, 1893 (*supra*, p. 70), the defendant on that date had outstanding \$9,000,000 of capital stock upon which, under the Lease, it would get a 10 per cent. rental, and bonds of \$3,925,000 upon which it would get the interest stipulated in the bonds. Now looking at the corresponding statement for 6th June, 1893, given in the foot note at p. 85 *supra*, it appears that the cost of the railroad property had increased to \$14,009,253.75, or, adding the unmounted material \$150,245.79 (*fol.* 340), not technically "supplies" under the Lease, to \$14,159,499.54, but that the amount of the capital stock still remained at \$9,000,000, and the bonds outstanding at \$3,925,000. The additional investment of \$1,084,253.75 (being the difference between \$14,009,253.75 and \$12,925,000, the amount of defendant's capital stock and bonds) was represented by *no* securities as yet issued, and, under the Lease, would, therefore, be represented by *no* income unless, to such additional investment, some part of the proceeds of the new \$6,000,000 of securities should be applied. That is to say the two "surplus" statements bring into clear relief the fact that, under the Referee's ruling, the increase of \$1,288,168.32 in the *cost* of the railroad was not, so far as the defendant was concerned, a corresponding increase in the *value* of the railroad.

Beyond a doubt, therefore, the ruling of the Referee to the extent of so much of the \$1,481,057.58, expended by defendant for conversion between 14th February and 6th June, as exceeds the principal fund of \$203,914.57 available, under Art. IV of the Lease (or the sum of \$463,094.40 if, under Art. XII of the Lease there be added the \$259,178.83 found by the Referee—A-37 at *fols.* 562, 563—to have been the proceeds of real estate and other capital assets sold after 14th February), for conver-

sion on 14th February and interest on that great sum, utterly undoes and defeats the primary and dominant purpose of the contract which induced the defendant's stockholders to ratify the Lease.

POINT II. [*First Principal Question.*]

The ruling of the Referee, unreasonably—and inconsistently with the entire transaction—excepts February-June construction expenditure from the financial arrangement between the parties, which concededly included all such expenditure before February and all such expenditure after June.

Prior to 14th February, 1893, the defendant had, upon the conversion which had been proceeding since 1st July, 1892, expended the large sum of \$1,823,102.92, as is shown by plaintiff's evidence cited at p. 60, *supra*. This expenditure was, as a matter of course, included in the total cost of the railroad—that is to say, defendant's total capital expenditure—reckoned to the date of the Lease, 14th February, 1893 (*supra*, p. 68). And against such expenditure was then outstanding the \$12,925,000 in par of bonds and stock upon all of which plaintiff, under the Lease, was to pay defendant the stipulated interest on the bonds and the 10 per cent. dividends upon all of the stock. So much for the *Period before 14th February, 1893*.

And so the \$6,000,000 expenditure which, according to plaintiff's claim, was to be made by defendant for conversion in the *Period after 6th June, 1893*, was to be represented by bonds and stock, upon all of which, under the Lease, plaintiff was again to pay defendant as rental the stipulated bond interest and the 10 per cent. dividends.

But, if the plaintiff and the Referee be right, we have the inexplicable anomaly that, for the *Intermediate Period*, 14th February to 6th June, defendant's conversion expenditure of \$1,481,057.58, although reckoned in the cost of the railroad on 6th June, 1893 (see evidence cited in foot note on p. 85 *supra*), was, nevertheless (except as to the \$463,094.40 [*supra*, p. 84] available under Arts. IV and XII of the Lease), to be represented by no bonds, stock or other securities whatever and to earn no income whatsoever to defendant. That is to say, although on 6th June the cost of the railroads, being defendant's capital expenditure, had increased net \$1,481,057.58 above what it was on 14th February (or, deducting the conversion fund available under Arts. IV and XII of the Lease, at least \$1,017,963.18 [*vide supra*, p. 84]), the amount outstanding of stock and bonds remained precisely the same—\$12,925,000. So that, unless the increase in capital expenditure could be taken from the \$6,000,000 of new securities issued after 6th June, such capital expenditure would be sheer loss to defendant.

No explanation whatever—no suggestion whatsoever—was made that either of the parties ever intended, thought or dreamed, that the defendant was absolutely to throw away, so far as any advantage to itself was concerned, the great amount of its entire February–June expenditure over the fund available under Art. IV, and to permit the benefit of such expenditure to accrue solely, completely, and without any consideration whatever, to the plaintiff. Not only is there not in the record even a scintilla of evidence, oral or in writing, that such a result was discussed by, or in the contemplation of, either of the parties, or any of the persons who took part in the transaction; but no tolerable reason for so amazing an anomaly can even be imagined.

POINT III. [*First Principal Question.*]

The ruling of the Referee makes a difference of a few weeks in the time of defendant's expenditure upon conversion of all importance and the expenditure itself of no importance.

And this, although, upon the facts which the Referee found (finding 12 at *fols.* 333, 334; finding 17 at *fol.* 336), earlier performance of the work was to plaintiff's own advantage. As the evidence already cited (*supra*, pp. 76-81) abundantly shows, any delay in the conversion was a serious detriment to the operation of the railroad and meant a serious diminution in its income.

Here was one single, indivisible, continuous piece of construction work which—it was of great moment to whichever company might thereafter operate the railroads—should be finished at the first possible moment. Every day of delay meant a large loss in operation to whichever company should be operating it. For plaintiff to have entered, as lessee, into a lease, the correct construction of which made it of enormous advantage to the defendant landlord to delay or suspend the doing of a certain stipulated work—and to plaintiff's own serious injury—would, one would think, to that extent, have been a folly on the part of the plaintiff. The case was precisely the same as if, instead of electrification, the work contracted for had been the completion of a new forty-story building upon foundations already laid by defendant at the corner of Clinton and Montague streets and upon plans and specifications already prepared and partially carried out. Suppose, after the making of the Lease, and a few weeks before it “took effect”, or possession thereunder was delivered, the defendant, in the face of

the whole world and with the complete knowledge of plaintiff, and without objection on its part, had gone on with the new building and completed it, would this Court listen respectfully to the plaintiff's claim that, as the work had been done a few weeks prematurely, defendant must pull the building down and rebuild it. Or, if not, then that defendant must be disallowed every dollar of the cost of the very building which plaintiff afterwards accepted and has now been continuously using for many years. Conceivably, the contract *might* have been so made; but the making of it would have been not only a folly but an absurdity, which it is not believed that this Court will tolerate.

The Court will go a great length to prevent an interpretation of an understanding or contract which implies the doing of a foolish or absurd thing.

Schoellkopf v. Coatsworth, 166 N. Y., 77: A lease for fifteen years provided for the erection of a building by the tenant, and that the latter might elect to terminate it at the end of that time, and that "at the expiration of the term *above* created," in case such notice were given, the landlord would pay the value of the building. In the absence of such notice it was provided that the term should continue for five years successively until such notice were given. At the end of twenty years the landlord gave notice, and claimed that the building was his without making payment therefor relying upon the literal interpretation of the clause compelling payment. This contention the Court rejected, saying by MARTIN, J., at p. 83 :

" Moreover, the effect of the construction
" contended for by the appellants, that if the
" lessor permitted the lessee to remain in
" possession for the additional term of five
" years all his right to compensation for the
" buildings and structures erected by him

“ was discharged and could not be enforced
 “ upon a subsequent termination of the lease,
 “ is not only inconsistent with the obvious
 “ intent of the agreement but would be un-
 “ reasonable, and such a construction ought
 “ not to prevail. It is a well-established
 “ canon of interpretation that, in seeking
 “ for the intent of parties the fact that a
 “ construction contended for would make the
 “ contract unreasonable and place one of the
 “ parties at the mercy of the other may be
 “ properly taken into consideration (*Gillet*
 “ v. *Bank of America*, 160 N. Y., 549,
 “ 557; *Russell v. Allerton*, 108 N. Y., 288;
 “ *Wright v. Reusens*, 133 N. Y., 298, 305;
 “ *Jugla v. Trouttet*, 120 N. Y., 21, 28).”

Coyne vs. Weaver, 84 N. Y., 386, by FINCH, J.,
 at p. 390 :

“ If it was necessary, in order to reach that
 “ interpretation, to be subtle and astute in
 “ our study of the language used, the quaint
 “ expression of Lord HOBART, cited with ap-
 “ proval in *Townsend v. Stearns* (32 N. Y.,
 “ 215), would furnish our justification. A
 “ court may wrestle, if need be, with unwill-
 “ ing words to find the truth, or preserve a
 “ right which is endangered.”

Russell v. Allerton, 108 N. Y., 288, by PECK-
 HAM, J., at p. 292 :

“ To give the words in question the mean-
 “ ing attached to them by the courts below,
 “ is to place the plaintiffs, in a matter purely
 “ of business, wholly at the mercy of others
 “ with whom they were contracting. Could
 “ the plaintiffs have intended any such re-
 “ sult, or could the defendant have expected
 “ such action on the part of the plaintiffs?
 “ * * * Parties have a right, of course,
 “ to make any contract they choose, so long
 “ as it is not illegal, but when the question
 “ arises as to what meaning is to be attached
 “ to words or phrases used in a contract, if
 “ there be any uncertainty or doubt concern-

“ing the same, considerations such as are
“above mentioned are entirely legitimate
“and should not be lost sight of while en-
“deavoring to learn the true meaning of the
“parties as evidenced by the terms used.”

Heyn v. N. Y. L. Ins. Co., 192 N. Y., 1.

Wright v. Reusens, 133 N. Y., 298.

POINT IV. [*First Principal Question.*]

An agreement between the parties that defendant should be credited with the cost of the February-June conversion work was proved by uncontradicted evidence.

There is a further and morally decisive consideration. It has never been suggested—very certainly nothing in this record permits the suggestion—that, when the Lease was made in February, 1893, or at any other time, plaintiff received from defendant any agreement that defendant should, out of its own moneys and without credit under the Lease, make expenditure from 14th February until the Lease should take effect. Is it to be believed or imagined that, considering the large amount of the expenditure of 14th February–6th June and the intrinsic importance of the matter to the parties, there should not have been *some* understanding between them as to the doing of that work? The proposition is so grossly improbable as to be inadmissible. Of course there *was* an understanding; and, unless it were an absurd one, it could have been nothing other than that for which the defendant now contends.

When the Lease was made on 14th and 15th February, 1893, and thereafter until 17th April, 1893, Hollins & Co. owned all the shares of plaintiff's stock; and Hollins & Co. could therefore

make an agreement binding plaintiff (Finding A-38 at fol. 564). Indeed plaintiff's directors were then merely "dummies" of Hollins & Co. (fol. 5264). Their authority to bind plaintiff is amply sustained by the following authorities which we shall presently cite more fully.

Little v. Garabrant, 90 Hun, 404 ;
aff'd. on opinion below in 153 N. Y.,
661.

Remington v. Caswell, 126 App. Div.,
142.

Groh's Sons v. Groh, 80 App. Div., 85.

Salomon v. Salomon, L. R., 1897, A. C.,
22.

Marbury v. Stone, 17 App. Div., 352 ;
aff'd. on opinion below, 160 N. Y., 701.

Stewart v. St. Louis, etc., R. Co., 41
Fed., 736.

Bostwick v. Young, 118 App. Div., 490 ;
aff'd. 194 N. Y., 516.

Parsons v. Hayes, 14 Abb. N. C., 419.

Elyea v. Lehigh Salt Mining Co., 169
N. Y., 29.

Stratton's Independence v. Dines, 126
Fed., 968.

The Referee ought to have found, not only,
as he did, that—

“ on or about the 16th day of February,
“ 1893, *conversation* was had between said
“ Hollins & Co., the then owners of the
“ entire capital stock of the plaintiff, and
“ the president of the defendant, that it
“ was for the interest of all the parties that
“ the work of conversion should be con-
“ tinued * * * ” (Finding 13, fol. 334)—

but also that a definite *agreement* was then made, as
was established by the uncontradicted testimony of
Messrs. Burke, Hollins, Lewis and Auerbach (cited

supra, pp. 76-81), that the work should proceed and the defendant be allowed for its cost out of the funds available for conversion under the Lease. Defendant's exception (*fols.* 788, 789) to this refusal of the Referee is valid.

So intrinsically and overwhelmingly probable, so consistent with all the facts, so equitable and so in accord with ordinary good sense would such an agreement have been that direct testimony to the making of it was unnecessary. Certainly slight evidence, if there were no more, would be laid hold of by the Court to establish it.

Wood v. Hubbell, 10 N. Y., 479, by WILLARD, J., at p. 481:

“ In weighing evidence introduced to prove
“ or disprove a given hypothesis, the intrinsic
“ probability of the fact sought to be estab-
“ lished, is not to be overlooked. It requires
“ less evidence to prove a fact that is highly
“ probable in itself, and which is in accord-
“ ance with the general course of business,
“ than one which is improbable, or which
“ stands in a state of indifference.”

Grant v. Bradstreet, 87 Me., 583, by PETERS, C. J., at p. 605 :

“ It would ordinarily take much less evi-
“ dence that an act has been done by a per-
“ son if such person has previously expressed
“ his intention and desire to do the act. A
“ man is very likely to do any reasonable
“ thing which his heart strongly inclines him
“ to do, and especially if the performance of
“ the act imposes no unwilling burden upon
“ himself. These propositions are very
“ strong in this case, because the circum-
“ stances are exceedingly favorable for their
“ application.”

Instead, however, of the evidence being slight, the evidence was overwhelming and uncontra-

dicted: Of the four witnesses, Messrs. Burke, Hollins, Lewis and Auerbach, who testified (*vide* pp. 76-81, *supra*), that such an agreement was made on or about 16th February, 1893, only one, Mr. Lewis, was at any time in defendant's interest. Messrs. Burke and Hollins were members of Hollins & Co., who then owned every share of plaintiff's stock, and Mr. Auerbach, a lawyer of eminence, was their and plaintiff's counsel. And there was no contradiction whatever of their testimony that, in plaintiff's behalf, they then asked defendant to proceed with the conversion work and promised that the cost should be applied against defendant's obligation.

Plaintiff now objects that there was no resolution of plaintiff's board and no written agreement. The absence of a directors' resolution is of no moment. The agreement was made by the entire body of plaintiff's stockholders, was acted on by defendant and was accepted by plaintiff.

Parsons v. Hayes, 14 Abb. N. C., 419. The statement of the head-note is that—

“ inasmuch as the acts complained of
 “ were performed with the consent and par-
 “ ticipation of C, who was, for the time be-
 “ ing, the holder of all the stock in the cor-
 “ poration, the latter had no cause of action
 “ or right to damages, and that the plain-
 “ tiff, suing on behalf of the corporation,
 “ was not entitled to relief.”

Stratton's Independence v. Dines, 126 Fed., 968,
 by RINER, J., at p. 974:

“ Stratton and these seven nominal share-
 “ holders were at the time of this sale the
 “ only members of the Company. The
 “ Company owned no other property except
 “ these mining claims, and I am unable to
 “ see how the Company can complain of an

“ act, of which all the members of the Company were cognizant and which they approved and confirmed.”

Groh's Sons v. Groh, 80 App. Div., 85; by HATCH, J., at p. 91:

“ John Groh and his mother owned all the stock and bonds. They were a majority of the board of directors; the third member was an employee and followed Groh's instructions. All the offices of the corporation were held by John Groh and his mother and the former conducted the business of the corporation without going through the form of holding directors' meetings or evidencing any act of the corporation by written minutes. In so far as John Groh dealt with third parties in connection with the business carried on by the corporation, he could create a legal liability against it and a third party would not be driven to the necessity of showing a resolution authorizing such dealing, or other minute vesting him with authority to act. Under such circumstances the business of the corporation may be lawfully carried on without formal votes, and if the obligation incurred is within the general scope of the business of the corporation, the transaction will be upheld and the third party need not prove formal action to establish the liability of the corporation. (*Sheridan Electric L. Co. v. Chatham Nat. Bank*, 52 Hun, 575; affirmed on appeal, 127 N. Y., 517; *Hall v. Herter Bros.*, 83 Hun, 19; S. C. on another appeal, 90 *Id.*, 280; affd. on appeal on opinion below, 157 N. Y., 694). ”

Eakin v. St. Louis Railroad Co., 8 Fed. Cases, No. 4236, by DILLON, *Circuit Judge*, at p. 235 :

“ Admitting that the directors and officers of the defendant company, under the Act of

“ 1870, above quoted, could not rightfully
 “ consummate and perfect a lease of another
 “ railroad company without the assent of the
 “ stockholders given as therein provided, yet
 “ having undertaken to do so, in execution
 “ of the agreement of August 13, 1871 (ex-
 “ hibit ‘C’), and having reported that fact
 “ to the stockholders at their annual meet-
 “ ings in 1873 and in 1874; and the defend-
 “ ant company having availed itself of the
 “ benefit of the lease and operated the
 “ leased road thereunder, and carried
 “ out the provisions of the lease by
 “ making three semi-annual payments of
 “ interest on the coupons, all with the
 “ knowledge of, but without objection
 “ from, the stockholders; this court, guided
 “ by the principles sanctioned by the Su-
 “ preme Court in the quite analogous case
 “ of *Zabriskie v. Cleveland, C. & C. R.*
 “ *Co.*, 23 How. (64 U. S.), 381, reasserted
 “ and applied in *Bessel v. Jeffersonville*, 24
 “ How. (65 U. S.), 287, 300; *Supervisors*
 “ *v. Schenk*, 5 Wall. (72 U. S.), 772; *Rail-*
 “ *road Co. v. Howard*, 7 Wall. (74 U. S.),
 “ 412; *Pendelton Co. v. Amy*, 13 Wall. (80
 “ U. S.), 305, and other cases, is of opinion
 “ that the lease in question has been, as in
 “ law it may be, ratified by acquiescence
 “ and action thereunder, as respects the in-
 “ nocent holder of bonds in question, and
 “ that the defendant company is estopped
 “ to insist as to such holders that the lease
 “ is void because not formally assented to
 “ by the stockholders by an express vote or
 “ writing. This provision is intended for
 “ their protection, and they may renounce
 “ or waive its benefits or may become
 “ estopped by their laches, acquiescence and
 “ conduct from insisting upon its use as
 “ a sword to cut down the rights of others.”

Steinway v. Steinway, 2 App. Div., 301, affirmed
 157 N. Y., 710, on opinion below, by BARRETT,
 J., at p. 304 :

“ The defendant William Steinway did not

“ here attempt to represent both sides. He
“ not only consulted the stockholders, but he
“ dealt directly with them. They gladly
“ assented to the enterprise, and fully sanc-
“ tioned all that was contemplated and pro-
“ posed. The enterprise was, in fact, a
“ pressing necessity, inaugurated for their
“ benefit, and for the benefit of all con-
“ cerned. * * * In thus dealing with
“ the stockholders, the trustee is dealing
“ *with the collection of individuals consti-*
“ *tuting the corporation*, and they may
“ make any bargain they please with him,
“ or permit any act which is not radically
“ *ultra vires.*”

Blum v. Whitney, 185 N. Y., 232: The Dis-
tilling Company of America was formed by the
merger of four large distilling corporations. A
circular was sent out to the stockholders of each of
these corporations, stating that it was proposed to
merge them into a corporation having a specified
capital stock, and that this consolidated corporation
(Distilling Company of America) was also to
acquire the stock of the Hannis Distilling Com-
pany. The promoters and directors of the Distilling
Company of America had an option on the stock
of the Hannis Company and sold it to their cor-
poration at a profit. The Court held that a stock-
holder of the Distilling Company of America suing
on behalf of himself and others, that is, on behalf
of the corporation, had no cause of action. By
EDWARD T. BARTLETT, *J.*, at p. 241 :

“ The stockholders of the constituent com-
“ panies and the individual defendants were
“ the organizers of the corporation and be-
“ came its first stockholders; they dealt
“ wholly between themselves as sellers and
“ buyers, organizers and corporation; no
“ other persons had any interest in this
“ initial transaction; if fraud had been
“ practised by any one of the organizers upon
“ those associated with him, the cause of

“action would have vested in the party
 “injured. * * * (p. 247). * * * We
 “are of opinion that the Distilling Company
 “of America was vested with no cause of
 “action against these defendants by reason
 “of the facts set forth.”

See also

Pittsburg, etc. Co. v. Keokuk, etc. Co.,
 131 U. S., 371.

Kneeland v. Hilman, 24 Wis., 39.

Giveen v. Gans, 91 App. Div., 37, aff'd
 without opinion, 181 N. Y., 538.

POINT V. [*First Principal Question.*]

Plaintiff is estopped to deny the agreement for the February-June conversion expenditure.

Now against all such overwhelming demonstration as to what *was*—and what *must* have been—the intention of the parties to treat the February-June conversion expenditure as the rest of such expenditure was treated, what answer was made by plaintiff to the Referee? Nothing except the technical objections (*a*) that no parol evidence of transactions between the parties before the Lease took effect on 6th June could modify it; (*b*) that, if the Lease were a binding agreement on the date of its execution, 14th February, 1893, no evidence of parol modification thereafter was receivable; and (*c*) that, if there were a modification, it was void because not approved by votes of the stockholders.

If all of these objections were in themselves valid—and later we shall show that they were not—they are disposed of by the estoppel conclusively shown to rest on plaintiff. It knew that the work was proceeding and made no objection either to the work or the time it was done or the character of the work; the holders of all its stock—that is to say the plaintiff itself (authorities last *supra*)—not only so knew, but requested that the work be done, and promised that defendant should be allowed for

its cost; the defendant made a vast expenditure on the faith of such request, promise and acquiescence which was of no use or value whatever to defendant except as it should, under the Lease, be allowed for the cost; the work done was precisely the work which plaintiff wished and had, in the Lease, contracted for; and finally the plaintiff accepted, took possession of, and has since fully enjoyed the work, deriving therefrom the full value which defendant put into it.

Under such circumstances no statute of frauds or legal rule as to parol evidence is permitted, whether in law or equity, to be a sword to inflict injustice, rather than a shield against it.

Wald's Pollock on Contracts, Williston's Edition,
790, 791:

PART PERFORMANCE IN EQUITY.—“ This
“ doctrine of part performance is not in
“ direct contradiction of the Statute of
“ Frauds. It would be erroneous to say that
“ a court of equity accepts proof of an oral
“ agreement and part performance of a sub-
“ stitute for the evidence required by the
“ statute. The plaintiff's right in the first
“ instance rests not on contract but on a
“ principle akin to estoppel; the defendant's
“ conduct being equivalent to a continuing
“ statement to some such effect as this: It
“ is true that our agreement is not binding
“ in law, but you are safe so far as I am
“ concerned in acting as if it were. A man
“ cannot be allowed to set up a legal
“ invalidity of an agreement on the faith of
“ which he has induced or allowed the
“ other party to alter his position. * * *
“ The same principle of equity is carried out
“ in cases of representation independent of
“ contract and even of mere acquiescence.
“ In equity an owner may be estopped by
“ acquiescence from asserting his rights, al-
“ though there has not been any agreement
“ at all. This also explains why the plain-

“tiff must show part performance on his
 “own side, and part performance by the de-
 “fendant would be immaterial. When the
 “Court is satisfied that the plaintiff has
 “altered his position on the faith of an
 “agreement, and that the defendant cannot
 “be heard to deny the existence of that
 “agreement, it proceeds to ascertain by the
 “ordinary means what the terms of the
 “agreement were. The proof of this is
 “strictly collateral to the main issue, though
 “the practical result is that the agreement
 “is enforced.”

O'Connor v. Green, 60 App. Div., 553 : The defendants signed a contract of subscription to pay for the construction of a sewer which the contractor pursuant thereto constructed. Upon being sued for the balance due, they attempted to set up a collateral agreement that there should be no liability upon their subscription until and unless certain other parties signed the subscription agreement. *Held*, they were estopped from setting up this defense ; this Court saying, by WOODWARD, J., at page 555 :

“They have stood by and watched the
 “contractor at his work ; they have ratified
 “his action by paying him a considerable
 “portion of his claim during the time that
 “he was putting in this sewer, and they
 “cannot now be heard to say that the con-
 “tract was not complete because it was not
 “signed by all of the people whom they may
 “have believed should have signed the
 “same.

“The defendants own this sewer ; they
 “are in a position to exact compensation
 “for the use of the same whenever the par-
 “ties supposed to be benefited make connec-
 “tions, and it would be most unjust and
 “inequitable to deprive the contractor of
 “the price of his work on account of the
 “conduct of parties who were not involved
 “in the contract.”

Swain v. Seamens, 9 Wall., 254: Land was sold by the plaintiff to the defendant upon mortgage with an agreement by the defendant to build thereon a saw-mill 50 by 150 feet in size. When completed, insurance policies upon it were to be delivered to plaintiff, whereupon the mortgage held by him upon the land was to be discharged. Defendant built a saw-mill, not of contract size, but instead 78 feet wide by 100 feet long. But this was done with plaintiff's knowledge. Insurance policies were tendered upon this saw mill, but were refused and it was sought to foreclose the mortgage. The federal Supreme Court said by CLIFFORD, J., page 274:

“ Taken as a whole, the proofs satisfy the
“ Court that his conduct and declarations
“ led them to believe that he was content
“ with the change made, and that he would
“ readily acquiesce in their doings when the
“ mill was completed, and, if so, he can not
“ be heard to allege or prove the contrary to
“ the prejudice of their rights.
“ Where a person tacitly encourages an
“ act to be done, he can not afterwards exer-
“ cise his legal right in opposition to such
“ consent, if his conduct or acts of encourage-
“ ment induced the other party to change his
“ position, so that he will be pecuniarily pre-
“ judiced by the assertion of such adversary
“ claim.”

Trustees of Brookhaven v. Smith, 118 N. Y., 634, the Court of Appeals saying by BROWN, J., at page 641:

“ When a party, either by his declarations
“ or conduct, has induced a third person to
“ act in a particular manner, he will not
“ afterwards be permitted to deny the truth
“ of the admission if the consequence would
“ be to work an injury to such third person
“ or to some one claiming under him.”

Atchison, Topeka & Santa Fe R'way v. Hurley, 153 Fed, 503: A coal company agreed to furnish the plaintiff railroad company with all the coal which it required at stated prices, payment to be made on the 15th of the following month. Becoming short of money, the Coal Company applied for advances from the plaintiff which were made upon the understanding that they were taken in payment of subsequent deliveries of coal. Upon the bankruptcy of the Company, it was held in a suit against the defendant receiver that he must furnish coal to cover these advances. By ADAMS, J., at page 509:

“ We find it unnecessary to consider the
 “ interesting question debated at the bar
 “ whether the oral agreement was such a
 “ substantive modification of the original
 “ one as distinguished from a change in de-
 “ tail of performance, as required it to be in
 “ writing to conform to the statute in ques-
 “ tion. It sufficiently appears that the rail-
 “ way company fully performed its part of
 “ the agreement. It advanced the money as
 “ agreed, but the coal company failed to re-
 “ pay it as agreed. Equity will not permit
 “ the statute of frauds to be invoked in fa-
 “ vor of a party who has not performed his
 “ oral undertaking against one, who, at
 “ his invitation and in reliance upon his
 “ promise, has expended money and changed
 “ his situation. That would make the stat-
 “ ute an instrument of fraud rather than a
 “ means to prevent it. It cannot be so em-
 “ ployed.”

Chicago, &c., R. R. Co. v. Moran, 187 Ill., 316,
 PER CURIAM, at p. 323:

“ We think it clear the parties themselves
 “ so construed the contract, and regarded the
 “ extra expense of cutting the Joliet lime-
 “ stone, over the Indiana stone, as not cov-
 “ ered by the contract and to be provided for

“ by a new agreement,—else why was such
 “ new agreement made? It was made, and
 “ appellee in good faith furnished and cut
 “ the more expensive stone thereunder.
 “ Appellant received the benefit. The
 “ agreement having been executed, an
 “ equitable estoppel certainly arises in Mo-
 “ ran’s favor, and appellant cannot now be
 “ allowed to repudiate its own act by which
 “ appellee was led into a line of conduct
 “ prejudicial to himself.”

There is a multitude of other authorities, burdensome even to enumerate, where the principle of equitable estoppel has been used to frustrate an unjust advantage sought under the statute of frauds or because some writing did not set forth the really subsisting agreement between the parties. In very many of them the silence of one party while observing conduct of the other was held decisive against the silent party. But we shall quote further the following definitions by eminent jurists which illustrate the purpose and scope of the doctrine :

2 *Pomeroy’s Equity Jur.*, Third Edition, section 804 : “ Equitable estoppel is the effect of the
 “ voluntary conduct of a party whereby he is abso-
 “ lutely precluded, both at law and in equity, from
 “ asserting rights which might perhaps have other-
 “ wise existed, either of property, of contract, or of
 “ remedy, as against another person, who has in
 “ good faith relied upon such conduct, and has
 “ been led thereby to change his position for the
 “ worse, and who on his part acquires some cor-
 “ responding right, either of property, of con-
 “ tract, or of remedy.”

(Section 802) : “ Equitable estoppel in the modern
 “ sense arises from the *conduct* of a party, using
 “ that word in its broadest meaning as including
 “ his spoken or written words, his positive acts, and
 “ his silence or negative omission to do anything.
 “ Its foundation is justice and good conscience. Its
 “ object is to prevent the unconscientious and in-

“equitable assertion or enforcement of claims or
 “rights which might have existed or been enforce-
 “able by other rules of the law, unless prevented by
 “the estoppel; and its practical effect is, from mo-
 “tives of equity and fair dealing, to create and
 “vest opposing rights in the party who obtains the
 “benefit of the estoppel.”

Wendell v. Van Rensselaer, 1 Johns. Ch., 344,
 by KENT, Chancellor, at p. 354 :

“There is no principle better established
 “in this Court, nor one founded on more
 “solid considerations of equity and public
 “utility, than that which declares that if
 “one man, knowingly, though he does it
 “passively, by looking on, suffers another
 “to purchase and expend money on land,
 “under an erroneous opinion of title, with-
 “out making known his claim, he shall not
 “afterwards be permitted to exercise his
 “legal right against such person. It would
 “be an act of fraud and injustice, and his
 “conscience is bound by this equitable
 “estoppel. *Qui tacet, consentire videtur.*
 “*Qui potest et debet vetare, jubet.*”

NOTE.—In *Kirk v. Hamilton*, 102
 U. S., 68, 76, the Federal Supreme
 Court quoted with approval such opinion
 of Chancellor KENT.

Erie County Savings Bank v. Roop, 48 N. Y.,
 292, by LEONARD, C., at p. 298:

“The principle is too well settled to
 “require the citation of authority, that
 “one cannot stand by in silence when he
 “knows that another is acting upon an
 “erroneous state of facts, and there-
 “after claim the benefit of the correct
 “state of facts, if such claim will tend
 “to the injury of the other person.
 “Much more is this rule just in a case
 “where, by his silence, he derives an
 “immediate and direct advantage over

“ the injured party. His silence then
 “ becomes deceit and fraud. The sup-
 “ pression of the truth, in such a case,
 “ has the same effect, and is equally
 “ culpable with the assertion of a false-
 “ hood.”

Bank of Monongahela Valley v. Weston, 172
 N. Y., 259, by O'BRIEN, J., for the Court at p. 266:

“ It is a general principle of law appli-
 “ cable to this class of cases that if a person
 “ either by words or conduct manifests his
 “ consent to an act which has been done, he
 “ cannot question the legality of the act. If
 “ he has an interest to prevent an act being
 “ done, but so acquiesces in it as to induce a
 “ reasonable belief that he consents to it and
 “ the position of others is changed by their
 “ giving credit to his sincerity, he has no
 “ more right to challenge the act to their
 “ prejudice than he would have had it been
 “ done by his previous license. In equity
 “ where a man has been silent when in con-
 “ science he ought to have spoken, he shall
 “ be debarred from speaking when con-
 “ science requires him to be silent.”

Horn v. Cole, 51 N. H., 287, by PERLEY, C. J.,
 at p. 290 :

“ It thus appears that what has been
 “ called an equitable estoppel, and some-
 “ times with less propriety an *estoppel in*
 “ *pais*, is properly and peculiarly a doctrine
 “ of equity, originally introduced there to
 “ prevent a party from taking a dishonest
 “ and unconscientious advantage of his
 “ strict legal rights,—though now with us,
 “ like many other doctrines of equity, habit-
 “ ually administered at law. * * *
 “ (p. 292): The doctrine having been
 “ borrowed from equity, courts at law that
 “ have adopted it should obviously look
 “ to the practice in equity for their guide
 “ in the application of it ; and in equity, the
 “ doctrine has been liberally applied to sup-
 “ press fraud and enforce honesty and fair

“dealing, without any attempt to confine
“the doctrine within the limits of a strict
“definition.”

The courts apply the doctrine without regard to the nature of case—whether originally of legal or equitable cognizance. See, for instance,

Bank of Monongahela v. Weston, 172 N. Y., 259, 266 (action on promissory notes);

Dunn v. Steubing, 120 N. Y., 232 (action to recover damages on contract).

POINT VI. [*First Principal Question.*]

No time for conversion work prescribed in Lease.

There was multifarious insistence in plaintiff's printed briefs before the Referee that the contract required that defendant's expenditure from the contractually available funds should be made *after* delivery of possession, *after* the lease should “take effect.” Upon that reading of the contract was based an argument that the contract, being in writing and under seal, could not be modified except by an instrument under seal, and that testimony was inadmissible with respect to any understanding between the parties arrived at before the lease “took effect” on 6th June. In truth the contract does not so read.

If plaintiff's contention were correct, is it credible that the contract should not have expressly provided that the work for which defendant should pay out of the funds provided by Arts. IV and V of the Lease should have been strictly limited to work done after the Lease should “take effect”? Plaintiff's argument is neither more nor less than an argument that the court shall interpolate these words in the contract.

The Lease in terms prescribed no given time whatever for doing the electrification work. By Article IV (*fols.* 67, 68) it was agreed that the balance of moneys, credits and securities “on hand at the date this lease shall take effect”—

“shall be used, applied and expended *by the lessor* in payment, *at the request of the lessee*, from time to time, of the cost of converting the railroads of the lessor into an electric railroad, * * *” etc.

Neither express nor implied was there any prohibition against the doing of the work before plaintiff should take possession or the Lease “take effect.” The covenant was one to apply money to meet cost of conversion; that is to say, that, for such an amount of capital there should be the same amount of investment in conversion. Nor was there anything in the Lease to prevent the defendant from providing for such expenditure by borrowing money in anticipation of receiving available moneys out of the sale of the \$6,000,000 of new stock and bonds.

So under Article V of the Lease (*fols.* 69–72), concerning the application of proceeds of the \$3,000,000 stock to be sold “at par” and of the \$3,000,000 in new bonds, the contract was not concerned with the time of doing the work, the provision was that—

“the proceeds of said stock and bonds, less any premium realized or received on the sale of said bonds, *shall be expended* by the lessor in payment, *at the request of the lessee*, from time to time, of the cost of converting,” etc.

Under the circumstances, and even if there were not the uncontradicted testimony of an actual agreement for the doing of the work before the lessee should take possession, the “request of the lessee” must be conclusively inferred from its knowl-

edge that the work was going on, from its failure to object to the work, from the advantage which the work meant to it and from its acceptance of the work without objection when it took possession of the railroad.

Gibbons v. Bush Co., 52 App. Div., 211, by WOODWARD, J., at p. 215 :

“ The law is well settled that a party can-
 “ not take advantage of his own wrong to
 “ impose a burden upon another, and to ex-
 “ clude evidence of the entire transaction
 “ between these parties under the applica-
 “ tion of a general rule to which there are
 “ conceded exceptions, would be to permit
 “ this defendant to exact heavy damages
 “ from the plaintiff for non-performance of
 “ a contract, at the same time that defend-
 “ ant was in the full enjoyment of the build-
 “ ings constructed by the plaintiff.”

If there were anything in such argument of plaintiff as to the time when the conversion work was done, it would be even more applicable to the time of the sale of the new stock and bonds. For by Article V of the Lease, the new stock was to be issued “six months after the delivery of this “lease” (*fol.* 70). The Lease was delivered on 17th April, 1893, (*Finding Sixth at fol.* 735). Six months after this would be 17th October, 1893. But the proceeds of sale of the stock were, to the extent of \$718,333.96 in par value thereof, not received until after that date—some of it as late as March, 1894 (*fols.* 4340, 4341). And it is undisputed that defendant in large part made its payments upon conversion cost down to 17th October, 1893, upon moneys borrowed in anticipation of the sale of the securities which it would, of course, sell according to the market conditions (*fols.* 4138–4142, 8953–8959).

Now, would argument be respectfully listened to from plaintiff that the \$718,333.96 of stock issued by it after 17th October, 1893, was issued in violation

of the lease, and therefore was not within its provisions providing for payment of dividends thereon to defendant? Or that, in addition to the stock issued after 17th October, 1893, and therefore not issued in compliance with the agreement, plaintiff might, under the compulsion of a law suit, require a like and additional amount to be issued as of the period before 17th October, 1893? Absurd as such a suggestion would be, would it be intrinsically any more absurd than the plaintiff's demand, sustained by the Referee, that defendant must now pay an amount equal to the February-June expenditure, for no other reason than that such expenditure was made a few weeks before the time prescribed by the agreement?

POINT VII. [*First Principal Question.*]

Defendant was entitled to allowance from the funds under Arts. IV and V of the Lease, for conversion work, whenever done—so long as plaintiff would not be charged with interest on more than \$6,925,000 of bonds or dividends on more than \$12,000,000 stock.

When, later on (*infra*, pp. 279–336), we defend the intrinsic justice of the adjustment by the Tripartite Agreement, we shall show that this proposition was fundamental to the meaning of the Lease when it was made, and was so understood by both parties. This *First Principal Question* is sufficiently answered, we think, by the estoppel and other arguments we are submitting. Still this proposition should be stated under this head, for, of itself, it is, we submit, decisive in defendant's favor.

The doctrine that language of futurity in an

agreement speaks from the date of its delivery, whether or not it have any other application to this case, certainly has no application to the doing of the conversion work. The covenant was one to apply *capital* funds defined in the Lease to payment of cost of construction. The language of Arts. IV and V was simply that the stipulated funds "shall be used, applied and expended" (Art. IV, at *fol.* 68) or "shall be expended by the lessor in payment, at the request of the lessee, from time to time of the cost of converting the railroads" &c. (Art. V, at *fols.* 70, 71). The "*shall* be expended" upon which plaintiff relies applies only to the expenditure of the money. There is no time limit whatever as to the doing of the work to be paid for. Defendant's payments after 14th February or 6th June, for work done respectively before those dates but not yet paid for out of capital funds, were just as clearly within the agreement as if the work had been done after.

The scope and purview of the agreement were plainly that, for every dollar of capital expenditure represented by bonds or stocks on which plaintiff was to pay interest or dividends, there should be a dollar's worth—neither more nor less—of conversion work available to plaintiff. This is the common sense of the agreement. Any other construction is intolerable. And of what imaginable moment could it be to plaintiff at what time (within reasonable limits) the work should be done, except that the sooner done, the better it would be for plaintiff.

POINT VIII. [*First Principal Question.*]

Allowances of the February-June expenditure not inconsistent with the Lease. Plaintiff's technical objections imply misconception of the transaction.

The arrangement that the conversion work should proceed and that defendant should be allowed for its expenditure thereon out of the available funds, contradicted no provision whatever of the contract. We challenge counsel to produce any article, sentence or word of the contract with which such an arrangement is inconsistent. The Lease required the expenditure for conversion of certain prescribed funds, the fund under Art. IV consisting of certain floating cash assets less certain deductions, and the fund under Art. V consisting of the proceeds up to par of the \$6,000,000 of new securities. As has been stated, it prescribed no time for the expenditure other than that it must be done from time to time as plaintiff should request. And it will hardly be denied that this request is conclusively to be inferred from the situation such as this indisputably was.

The agreement that the work should proceed and that defendant should be allowed for it out of the available funds was *in promotion and in performance, not in frustration or alteration*, of the contract. Where a negotiation for a contract extends over a period of time and the contract, when finally executed as the result of the negotiation, contains the stipulation that one of the parties should do something which was not done at the beginning of negotiation but which was done during the negotiation and before the contract was actually executed, it is deemed to have been done in contemplation of and in performance of the contract.

Union Pacific Railway Co. v. McAlpine, 129 U. S., 305 : The Union Pacific Railway Company proposed to Mrs. McAlpine to exchange for a lot owned by her a section of land owned by it. She assented to this exchange and was informed by the superintendent of the Railway Company that its governing body had agreed to such exchange. Thereupon she entered on the railroad's plot and made improvements. The resolution authorizing the exchange was not passed until after the improvements were made. No deed was ever given by the Company and this action for specific performance was brought. By FIELD, J., at page 312 :

“ The fact that possession was taken before
 “ the ratification of the board in June, 1878,
 “ did not impair the effect of that possession as
 “ an act of part performance. The taking
 “ possession of, that is, exercising control
 “ and dominion over the property, was re-
 “ ferable entirely to the contract. It was
 “ an act done with respect to the property
 “ by the consent of the vendor, which would
 “ not have been done if there had been no con-
 “ tract. This consent gave to the act, which
 “ would otherwise have been tortious, its
 “ character as one of part performance.”

Cartwright v. Wilmerding, 24 N. Y., 521. Money was advanced upon the faith of securing bills of lading on goods intended to be pledged, but the bills of lading were not actually delivered until some time after the money had been advanced. *Held* that, under the Factor's Act, such money was advanced “ upon the faith ” of the bill of lading. By GOULD, J., at page 533 :

“ That a person, by the act made, *pro hac*
 “ *vice*, ‘ the true owner ’ of the goods, cannot
 “ pledge them, without an instantaneously
 “ concurrent delivery of the bill of lading,
 “ custom-house permit, or warehousekeeper's

“ receipt ; that he cannot receive the money
“ on one day, and complete the contract of
“ pledge on the next ; seems a very strange
“ position, even if there be English decisions
“ of such a purport. To say, in such a case,
“ that the advance is made on the faith of
“ the promise to pledge, and not on the faith
“ of the pledge, is a nicety of refining far too
“ nice for the ordinary, common sense deal-
“ ings of business men.”

Ex parte Ames, 1 Lowell, 561: Pending negotiations for a mortgage on specific property the prospective mortgagee advanced money upon the faith of such mortgage. *Held*, in bankruptcy, that the mortgage was good as security for such prior advances. By LOWELL, *J.*, at page 564 :

“ I have always ruled that security fairly
“ given, as part of the same transac-
“ tion as the loan, could not be invalidated
“ by a change of the borrower’s situation
“ *re infecta*, as if the money were advanced
“ while the mortgage was in course of
“ preparation, and the debtor fails in the
“ meantime.”

In re Montgomery, 17 Fed. Cas., No. 9732, by GRESHAM, *J.*, at page 627 :

“ The agreement to give a mortgage at
“ the time the \$200 was loaned was binding,
“ and Monyhan might have enforced the
“ same against the bankrupt. In equity
“ the case stands as if the mortgage had
“ been executed at the time of the loan.”

POINT IX. [*First Principal Question.*]

Modification of the lease by parol or by the conduct of the parties was admissible, not only after the formal delivery on 17th April, 1893, but also after 14th February, 1893, when the lease was executed by both parties.

FIRST: DEFENDANT'S CONVERSION EXPENDITURE BETWEEN 17TH APRIL AND 6TH JUNE, 1893.

Plaintiff will not dispute the complete delivery of the Lease between plaintiff and defendant as early as 17th April, 1893, for that was its own assertion (its request XVII at *fol.* 676); and the fact was found by the Referee as part of the Decision proper (finding SIXTH at *fol.* 735). On that day, at the latest, the Lease became a binding agreement. Although the agreement of 17th April provided (plaintiff's finding XVI at *fols.* 672, 673) that

“notwithstanding the delivery and acceptance of said lease, the same should not go into effect nor should the plaintiff be entitled to enter into possession * * * until the \$4,000,000 * * * guaranty fund, should have been actually deposited
“ * * * ” —

still that provision did not make the Lease itself any the less binding, but prescribed a condition for the delivery of possession and the taking effect of the demise proper provided for in the Lease. The article of the Lease, as adopted by the stockholders of the two corporations, which remitted it to the boards of directors of the two companies to determine the detail of such delivery and effectuation of the Lease, did no more than constitute the two boards a medium for such detail.

Mechanics' National Bank v. Jones, 76 App. Div., 534; affirmed 175 N. Y., 518: An agreement between debtors and their creditors provided for the formation of a corporation to take over the debtors' property upon certain conditions, leaving unsettled, however, the details of payments for insurance, taxes, interest and current-caring charges upon incumbered properties, the funding of rents and the making of improvements. The debtors who had delivered deeds to their property in escrow pending the completion of the corporate organization withdrew their authority to the escrow agent to deliver the deeds. *Held*, specific performance would be enforced, although the matters of detail referred to were left in the discretion of the directors of the corporation. The unanimous opinion of the Court was delivered by HISCOCK, J., who said at p. 550 :

“ If, upon the evidence presented to us
“ upon this appeal, we had been convinced
“ that *important and essential provisions*
“ of an attempted or purported agree-
“ ment between the parties had been left
“ undetermined, the case would at once have
“ come within those authorities cited in
“ behalf of the appellants where specific per-
“ formance has been denied. A court of
“ equity cannot make contracts in behalf of
“ parties which they intend to make for
“ themselves, and it is very obvious that such
“ a court cannot enforce specific performance
“ of a contract which has never been com-
“ pleted and made. Upon the other hand,
“ assuming, as we have held that the parties
“ to this controversy did reach an agreement
“ upon the *essential details* of the matters
“ involved between them, the court had an
“ undoubted right to grant relief in the
“ form of a decree for specific performance.
“ *The completeness of the agreement between*
“ *the parties for the purposes of this action*
“ *was not, in our opinion, impaired by the*
“ *fact that the execution of some of its de-*

“ *tails was remitted to the corporation*
 “ *agreed upon by the parties as the medium*
 “ *for such purpose.*”

The Lease, as has been shown, contained no provision whatever limiting the time of doing the work to the cost of which defendant was to apply the funds under Articles IV and V. The application was to be made “at the request of the “lessee, from time to time” (*fol.* 68, 70, 71). Defendant’s expenditure for conversion after 17th April and before 6th June was \$884,875.66 (*Decision, fol.* 737). And plaintiff’s knowledge, failure to object and acceptance, taken in connection with the undisputed testimony of Burke, Hollins, Lewis and Auerbach—and even entirely without it—established a continuing request beyond a peradventure.

As to \$884,875.66, therefore, defendant’s conversion expenditure before 6th June, 1893, was—even according to plaintiff’s argument—strictly under and in performance of the contract. And if that were not so, and if the provisions of Arts. IV and V could be held to authorize defendant’s expenditure only after delivery of possession, nevertheless, since the agreement did indisputably subsist on 17th April, the behavior of the parties after that date effectually modified it so as to bring the expenditure after that date within Arts. IV and V. Such modification of a written instrument under seal may be made by parol agreement or the conduct of the parties.

Brady v. Cassidy, 145 N. Y., 171: Defendant had made a contract whereby it was to purchase plaintiff’s “entire manufactured stock * * * “now on hand at plaintiff’s foundry,” at 80 *per cent.* of the list price of such stock. Plaintiff attempted to show at a former trial of the action that, prior to the making of that contract, it had been agreed that he should have

the right to sell from his foundry any part of such stock to any other purchaser previous to defendant's taking possession of the stock and paying for the same. This evidence was ruled out as parol evidence varying a written contract. Plaintiff then amended his complaint alleging a waiver of the conditions of the written contract. And under this allegation (and the defendant here has fully pleaded the facts in its answer, [*fol.* 179-181]) the trial court allowed him to prove the facts resting in parol prior to the making of the contract, and, in addition, that, subsequent to the making of the contract, defendant knew, and in some cases assisted in the disposition of items of stock on hand at the foundry. This ruling was unanimously affirmed by the Court of Appeals, saying, by PECKHAM, J., at p. 180 :

“*It is no objection to evidence which characterizes and explains the facts which occurred at the time of the delivery of a portion only of the goods, that such explanatory matters occurred before or at the time of the execution of the contract itself, and not at the time when the partial delivery was made. If the facts, whenever they occurred, tend to explain the circumstances attending the failure to deliver all the goods and to show that such failure was understood, acquiesced in and assented to by the defendants, the evidence itself is competent. The evidence given on the part of the plaintiffs, if believed by the jury, was sufficient to constitute a waiver by the defendants of the full performance of the contract by the delivery of all the goods included in its terms.*”

Courtenay v. Fuller, 65 Me., 156, by DICKERSON, J., at p. 158 :

“Extrinsic verbal evidence is admissible to prove a new and distinct agreement upon a new consideration, whether it be a sub-

“stitute for the written contract, or in addition to and beyond it. * * *

“We see no objection to applying this principle to cases where there has been a verbal agreement to change the written contract, wholly, or in part, made contemporaneously with it, where such verbal agreement has been adopted by the parties subsequently to the execution of the written contract. *The subsequent adoption of the verbal, contemporaneous agreement in the latter case, places it upon the same footing, in respect to the written contract, as the subsequent parol agreement in the former one.*”

Collins v. Lester, 16 Ga., 410, by STARNES, J., at p. 414 :

“Such restricted agreement, however, was not in the written instrument; and by legal intendment, it could not have been made before, or at the time of the execution of that instrument, because it would have been extinguished by the latter. It must, then, have been entered into subsequently. Regarding such subsequent contract, as being thus presumptively shown to have been orally made, this testimony of the verbal negotiations, *previous to the date of the writing*, was proper for the jury, as serving to throw light upon the nature and character of the subsequent understanding; and the same were in aid of the strong presumptive evidence which has been just detailed. Not as proving that such oral agreement was made and entered into, before or at the time of the execution of the instrument, but as serving, by a detail of preliminary negotiations, to show, more clearly, what must have been the subsequent agreement otherwise proven to have been made.”

Plaintiff objected further that any such modification would be void under section 78 of the Railroad

Law in force in 1893 unless with the consent of the two-thirds of the stockholders of the roads given at a meeting of such stockholders. But plaintiff cannot avail itself of that objection. The owner of *all* of its stock agreed to the parol modification ; and plaintiff cannot object to the injury of defendant. Section 78 of the Railroad Law then in force (L. 1892, ch. 676) provided that,

“if such contract shall be a lease of any such
“road and for a longer period than one year,
“such contract shall not be binding or valid
“unless approved by a vote of the stock-
“holders owning at least two-thirds of the
“stock of each corporation present and
“voting in person or by proxy at a meeting
“thereof * * * and there shall be indorsed
“upon the contract the certificate of the sec-
“retaries of the respective corporations under
“the seals thereof, to the effect that the same
“has been approved by such vote of the stock-
“holders, and the contract shall be executed
“in duplicate and filed in the offices where
“the certificates of incorporation of the con-
“tracting corporations are filed.”

In the absence of statute in New York directors have a right to lease a railroad without the consent of the stockholders (*Beveridge v. N. Y. El. R. Co.*, 112 N. Y., 1). The provision in the statute was inserted simply for the protection of the stockholders, and could be waived by them. Since all the stockholders of the Brooklyn Heights Company at the time, when Hollins & Company gave their assurances, were cognizant of the assurances that were made, and thereafter—and especially after the formal delivery of the Lease on 17th April, 1893—were also cognizant of the fact that the Brooklyn City Railroad Company was acting upon them, they must be deemed to have waived the statutory provision and are certainly estopped from setting it up.

St. Louis Railroad v. Terre Haute Railroad,
145 U. S., 393, by GRAY, J., at p. 402 :

“ The plaintiff relies on the statute of Illinois * * * by which it was enacted that ‘ it shall not be lawful for any railroad company of Illinois, or for the directors of any railroad company of Illinois, to * * * lease their road to any railroad company out of the State of Illinois, or to lease any railroad out of the State of Illinois, without having first obtained the written consent of all the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void ’; * * * Although this statute, in terms, declares that any such lease, made without the written consent of the Illinois stockholders, ‘ shall be null and void,’ it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. *It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel*; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time, otherwise, to deny (*Zabriskie v. Cleveland, etc., Railroad*, 23 How., 381, 398; *Central Transportation Co. v. Pullman’s Car Co.*, 139 U. S., 24, 42, 60; *Davis v. Old Colony Railroad*, 131 Mass., 258, 260; *Beecher v. Marquette & Pacific Co.*, 45 Michigan, 103; *Thomas v. Citizens’ Railway*, 104 Illinois, 462). ”

Kent v. Quicksilver Mining Co., 78 N. Y., 159,
by FOLGER, J., at pp. 185-186:

“ The stockholders, by acquiescing in the
“ action of the corporation in making the
“ preferred stock, have ratified and assented
“ thereto, and that the same is binding on
“ them by reason of such assent and ratifi-
“ cation. In the application of the doctrine
“ of *ultra vires*, it is to be borne in mind
“ that it has two phases: one where the
“ public is concerned; one where the ques-
“ tion is between the corporate body and the
“ stockholders in it, or between it and its
“ stockholders, and third parties dealing with
“ it and through it with them. When the
“ public is concerned to restrain a corpora-
“ tion within the limit of the power given
“ to it by its charter, an assent by the stock-
“ holders to the use of unauthorized power
“ by the corporate body will be of no avail.
“ When it is a question of the right of a
“ stockholder to restrain the corporate body
“ within its express or incidental powers,
“ the stockholder may in many cases be de-
“ nied, on the ground of his express assent
“ or his intelligent though tacit consent to
“ the corporate action. If there be a de-
“ parture from statutory direction, which is
“ to be considered merely a breach of trust
“ to be restrained by a stockholder, it is per-
“ tinent to consider what has been his con-
“ duct in regard thereto. A corporation
“ may do acts which affect the public to its
“ harm, inasmuch as they are *per se* illegal
“ or are *malum prohibitum*. Then no as-
“ sent of stockholders can validate them.
“ It may do acts not thus illegal, though
“ there is a want of power to do them,
“ which affect only the interest of the
“ stockholders. They may be made good
“ by the assent of the stockholders, so
“ that strangers to the stockholders dealing
“ in good faith with the corporation will be
“ protected in a reliance upon those acts.
“ * * * Such an act, though beyond the

“power given by the charter, unless expressly prohibited, if confirmed by the stockholders could not be avoided by any of them to the harm of third persons. This arises from the principle that the trust for stockholders is not of a public nature (Per WILLES, J., *Taylor v. C. & M. Railway Co.*, 2 L. R. (Exch.), 390). These questions have been so much discussed that we need not amplify (*Whitney Arms Co. v. Barlow*, 63 N. Y., 63; *Phosphate, etc., Co. v. Green*, L. R. (7 Com. Pl.), 43; *Evans v. Smallcombe*, L. R. (3 H. of L.), 249).”

The similar question which arises under the statutory requirement that there shall be a formal consent of stockholders to a mortgage executed by a corporation (Stock Corporation Law, § 6), has been decided by this Court, the mortgage being upheld where the consent of all the stockholders was not in writing or given at a stockholders' meeting, but merely informal and oral.

Atlantic Trust Co. v. Crystal Water Co., 72 App. Div., 539, at p. 545, by JENKS, J.:

“As to the statutory assent. It is undisputed that the seven stockholders, or, in other words, all of the existing stockholders, assented on July third, while on July sixteenth the great bulk of the stock was originally issued to Stearns. The provision requiring the assent of the stockholders is for the benefit of the stockholders, and it is ‘at least doubtful’ whether the corporation can raise this defense (*Rochester Savings Bank v. Averell*, 96 N. Y., 467, 473; *Paulding v. Chrome Steel Co.*, 94 *id.*, 334, 341; *Greenpoint Sugar Co. v. Whittin*, 69 *id.*, 328). * * * Moreover, the defendant, so long as it holds the benefit of any property acquired under the mortgage, is, I think, estopped from raising

“ the point within the authority of *Hamilton Trust Co. v. Clemes* (17 App. Div., 152, 157; aff'd 163 N. Y., 423). In *Seymour v. S. F. C. Assn.* (144 N. Y., 333), FINCH, J., said: ‘There were some alleged technical irregularities in the issue of the bonds. These represented the purchase price of the land which the corporation bought and kept and were its promise to pay, which it could not justly repudiate. That kind of plunder which holds on to the property but pleads the doctrine of *ultra vires* against the obligation to pay for it has no recognition or support in the law of this State (*Whitney Arms Co. v. Barlow*, 63 N. Y., 62; *Duncomb v. N. Y. H. & N. R. R. Co.*, 84 *id.*, 199; *Woodruff v. Erie R. Co.*, 93 *id.*, 619).’ ”

SECONDLY. DEFENDANT'S CONVERSION EXPENDITURE BETWEEN 14th FEBRUARY AND 17th APRIL, 1893.

Defendant's expenditure of money at plaintiff's request was in direct fulfillment of its obligation under Article V of the Lease, which specified no particular time for the expenditure. The fixing of the time at plaintiff's request was not in variation, but in execution, of the provisions of the Lease itself.

Lawrence v. Miller, 86 N. Y., 131 : An agreement under seal for the purchase of lands specified no time for performance. The Court said, by FOLGER, C. J., at p. 139 :

“ For the parties to agree on a day was not a change of the contract, for it was silent upon that. To agree upon a day, in such case, is a thing that may be done by parol. The time, when finally agreed upon, was an essential part of the contract.”

But even if defendant's expenditure of money at plaintiff's request were not strictly in performance of Arts. IV and V of the Lease, then certainly the conversations of 16th February, 1893, (Finding 13 at fol. 334), effected a sufficient modification of the provision so as to make that provision truly express the original intention of the parties. That a parol agreement, especially if it be executed, is competent to modify a prior written contract, is left in no doubt by the authorities. That the time of performance prescribed by an agreement under seal can be modified by a parol understanding acted upon is now very familiar law.

General Electric Co. v. National Contracting Co., 178 N. Y., 369, by O'BRIEN, J., at pp. 375, 376 :

“The defendant could, no doubt, have insisted upon strict performance of the contract according to the written instrument; and had it assumed that position, the plaintiff would then know where it stood, but the defendant permitted the plaintiff to go on with the work after the specified date, and indeed was willing that it should do so, and hence we think it is estopped to claim that this was not performance of the contract. * * * It was, therefore, in the power of the parties to change the terms of the contract by parol as to time. It is found that they did actually make the change, and the defendant, under the circumstances of the case, is estopped from setting up the defense of non-performance as to time.”

Solomon v. Vallette, 152 N. Y., 147 : A contract provided that plaintiff should make no purchases without written consent of defendant. After the contract was made, defendant's attention was called to the fact that plaintiff's stock needed replenishing, and

he then orally authorized plaintiff to make the necessary purchases. By HAIGHT, J., at p. 151 :

“ It is true that this direction was oral,
“ but it was subsequent to the written con-
“ tract, and it was competent for the parties
“ to modify a written agreement by an oral
“ arrangement.”

Grange v. Palmer, 56 Hun, 481, by MAYHAM, J., at p. 483 :

“ The doctrine that a specialty cannot be
“ varied before breach, by a parol executory
“ contract, while of general and almost uni-
“ versal application, seems to be subject to the
“ exception that the time fixed for its per-
“ formance may be enlarged by parol, where,
“ by the terms of such parol enlargement,
“ the party claimed to be in default has been
“ induced to forego a strict performance by
“ reason of the agreement of the other party
“ to the contract to extend the time.”

The conclusion to which we are thus brought is undeniably in accordance with justice, and will give effect to the unquestioned understanding of the parties, not only as it was manifested after the Lease was executed, but also as it must have been before and at the time of its execution. But, against this equitable construction, plaintiff urges that there was no contract of lease until after 14th February, and that therefore such verbal understandings (if, indeed, they must be invoked to affect the construction of the Lease) had no written contract upon which they could then operate. A brief survey will, we submit, demonstrate the error of this contention. The *proposition* for the Lease was made by Hollins & Company in December, 1892 (Finding II., fol. 654), and after consideration by defendant's directors was recommended by them to its stockholders. The written lease itself was executed,

sealed and acknowledged by both corporations on 14th February, 1893 (Finding V, *fol.* 659, 660). It contained, however, the following provision:

“It is mutually covenanted and agreed
 “between the lessor and lessee that this
 “lease shall not be binding or valid as to
 “either of the parties hereto *until* approved
 “by the vote of the stockholders of the lessor
 “and lessee as required by law * * *.”

Lease, Art. XLVII., *fol.* 132.

Such approval was given as to plaintiff on 14th February, 1893, and as to defendant on 15th February, 1893 (Findings VI, VII, *fol.* 660, 661); and according to its terms the Lease then became “valid and binding.” To oppose this plain conclusion plaintiff relies upon the portion of Art. XLVII. which follows that already quoted :

“and that if so approved, this Lease shall
 “be delivered *to the lessee* at such time and
 “upon such terms and conditions as shall be
 “agreed upon by the Board of Directors of
 “said lessor and lessee * * *” (*fol.* 132).

But obviously this clause, thus carefully limited to the delivery to the lessee, does not refer to “delivery” as the act which evidences a meeting of the minds and marks the inception of the contractual relation. It just as clearly means merely that *possession of the instrument* shall be withheld from the lessee except upon conditions later to be agreed upon by the managing officials of the lessor and lessee corporations. And we have seen that leaving that discretion in the officials of the contracting corporations did not affect the validity of the contract itself (*Mechanics’ Nat. Bank v. Jones*, 76 App. Div., 534; affirmed 175 N. Y., 518, quoted from above at p. 123). The purpose of this provision, and the wisdom of that purpose, it is not

difficult to recognize. The instrument operated to transfer to the Brooklyn Heights Company—which, of itself, had small means and owned a half mile of railway against the two hundred miles included in the Lease—practically the absolute legal title to possession of all of defendant's property. And, before it should go into effect as a transfer, and possession thereunder be taken, there had to be made by plaintiff with the Brooklyn Trust Company in accordance with the covenants of the Lease itself (Art. XXXV, at *fols.* 111, 112) a deposit of \$4,000,000 as security to defendant for the performance by the lessee of its obligations under the Lease. It was a very proper and suitable caution to withhold from the lessee the possession of the instrument of Lease except upon such terms as would, in the light of later happenings, seem safe to the lessor's directors. Certainly the stockholders who were called together upon upward of a month's notice to ratify the Lease did not suppose that they had given a mere *option*. They did not expect that, because of that caution, their approval had no meaning, and that, notwithstanding their solemn and deliberate action, they had accomplished nothing by which either party was bound. Nor may we assume that the directors of the two companies who formally executed, sealed and acknowledged the instrument and presented it to the stockholders for approval did not intend that a binding obligation should then be created.

But, if this be a case of doubt, then we may appeal to the contemporaneous acts of the parties to determine the true construction of the instrument.

Woolsey et al. v. Funke, 121 N. Y., 87. By PECKHAM, J., at page 92 :

“ But if I am not clearly right in this
“ interpretation of the language, it must be
“ at least be admitted, as it seems to me,
“ that the language is somewhat ambiguous

“ or indefinite. Under such circumstances
 “ the practical interpretation of this agree-
 “ ment by both parties is a consideration of
 “ very great importance. As was said by
 “ Mr. Justice Swayne in *Insurance Com-*
 “ *pany v. Dutcher* (95 U. S., 269, 273),
 “ ‘ the construction of a contract is as much
 “ ‘ a part of it as anything else. There is
 “ ‘ no surer way to find out what parties
 “ ‘ meant than to see what they have done.
 “ ‘ Self interest stimulates the mind to ac-
 “ ‘ tivity and sharpens its perspicacity.
 “ ‘ Parties in such cases often claim more,
 “ ‘ but rarely less, than they are entitled to.
 “ ‘ The probabilities are largely in the direc-
 “ ‘ tion of the former.’ Let us see then
 “ what the parties have said and done in re-
 “ gard to this matter.”

Nicoll v. Sands, 131 N. Y., 19, 24.

Fox v. Coggeshall, 95 App. Div., 410,
416.

Anderson v. English, 105 App. Div.,
400, 403.

We have the facts that, immediately after the
 execution of the Lease, Mr. Lewis, defendant's
 president, conferred with Hollins & Company, and
 not with his own directors, concerning the course to
 be pursued in view of the injunction (*fols.* 5265,
 5235-5237); that Hollins & Company, owners of
 all the shares of plaintiff's stock—plaintiff's direc-
 tors being their “dummies” (*fol.* 5264)—gave
 not only verbal, but written, directions as to the
 conduct of the work (*fols.* 5237, 5238, 5252, 5253,
 5283, 5661); that Hollins & Company supervised the
 making of conversion contracts (*fol.* 5253)—and all
 of which would certainly go to show that the parties
 themselves considered that a binding contract of
 lease had been executed between them. And, be-
 yond those facts, we may consider directly the agree-
 ment of 17th April, 1893, itself under which the

“delivery” of the Lease to the lessee was made and upon which plaintiff relies. This agreement is “Plaintiff’s Exhibit 1” (*fol.* 7561–7572), and commences with the following preamble (*fol.* 7561, 7562):

“ WHEREAS, the parties hereto ENTERED
“ INTO a *certain contract of lease* bearing
“ date the 14th day of February, 1893, by
“ which the party of the first part leased to
“ the party of the second part all its railroad
“ franchises, privileges and property; and
“ WHEREAS, said lease *provides* among
“ other things as follows: This lease shall be
“ delivered to lessee at such time and upon
“ such terms and conditions as shall be
“ agreed upon by the Board of Directors of
“ said lessor and lessee; and
“ WHEREAS, the parties hereto desire *pur-*
“ *suant to said provisions of said lease*, to
“ fix the time, terms and conditions upon
“ which said lease shall be delivered ;”

The April agreement then provided the following terms and conditions of the delivery of “said lease
“ *to the party of the second part* upon the 17th
“ day April, 1893” (*fol.* 7563):

(1) The deposit with New York Guaranty & Trust Company as Trustee of 270,000 shares of Long Island Traction Company having a par value of \$100 each (*fol.* 7563, 7564).

(2) The giving to each shareholder of defendant the right to purchase for every ten shares owned in defendant, three shares in the Long Island Traction Company at a price of \$15 per share (*fol.* 7564–7566). Whereupon plaintiff agreed to “accept the
“ *delivery of said lease*” on 17th April, thus in effect agreeing that the conditions already mentioned should have been performed on that day (*fol.* 7567).

NOTE: *The Referee has found that Hollins & Company who owned all of*

plaintiff's stock on 17th April, 1893, also controlled the incorporation of the Long Island Traction Company, so that it was practically feasible for plaintiff to make such agreement (Findings A-38, fol. 564, A-29, fol. 556).

(3) That the agreement of 17th April, 1893, was not to be deemed to modify the provisions of the Lease that it should not go into effect nor should possession be taken thereunder until the deposit of the \$4,000,-000 guaranty fund (*fols. 7567-7569*).

(4) Possession should not be taken until the dissolution of the Markey injunction (*fols. 7569-7570*).

(5) An inventory should be made of defendant's personal property (*fols. 7570-7571*).

The agreement of 17th April, 1893, recognized, therefore, the existence of the Lease as a binding and valid contract. It purported in no sense to give life to an agreement which before that time had been a mere parchment. Its provisions were designed solely to assure the performance of plaintiff's covenant with respect to furnishing the guaranty fund (Art. XXXV, *fols. 111, 112*), and to provide for the participation of defendant's stockholders upon the terms set forth in the original Hollins' proposal (Finding II, *fols. 654-658*). It was therefore, we submit, not an agreement giving life to the Lease as a contract, but an agreement collateral to the existent contract. Under the conditions mentioned in it, the muniment of title was passed into plaintiff's possession, but was so avowedly "pursuant to said provisions of" the already existing "contract of lease" (*fols. 7561-7562*). It is well settled that a manual delivery even of an instrument under seal is not required to give it binding effect where the minds of the parties have met, and

the provisions of the deed recognized as representing the contract between them.

Wigmore on Evidence, vol. IV., sec. 2408 :
“ It is clear that there can be no fixed and invariable mark of finality ; or, in the older phraseology, what amounts to a delivery depends upon the circumstances of the case. No specific manual act is decisive * * * . The maker's retention of the document does not necessarily negative the act's finality * * * . There is, therefore, no infallible mark of finality for a deed—whether it be the act of writing, or of sealing, or of manually delivering, or of publicly recording. Subject to certain usual presumptions of conduct, the circumstances of each case must control.”

Sarasohn v. Kamaiky, 193 N. Y., 203, by CHASE, J., at p. 214 :

“ Whether certain acts, words and circumstances constitute a delivery of an agreement is a question of intent. The usual way of delivering a unilateral agreement is by physically handing the paper upon which it is written to the grantee or promisee. *In case of a bilateral agreement the delivery is usually evidenced by words.* It is not necessary that a delivery be evidenced in any particular or prescribed manner. Any evidence that shows that *the parties to a written instrument intend that the same should be operative and binding upon them is sufficient* in an action to enforce its provisions.”

Dietz v. Farish, 79 N. Y., 520 : Instruments were delivered on condition that they should not be operative until passed upon by counsel for one of the parties. Held that no contract had come into existence. The Court approved of the law as laid down by the House of Lords in *Xenos v. Wickham*, 2 H. of L.,

296, which it stated in the following language of CHURCH, C. J., at p. 525 :

“ A policy of insurance was executed by
 “ two directors, and purporting to be signed,
 “ sealed, and delivered in the presence of the
 “ secretary, made in pursuance of written
 “ instructions by plaintiff’s broker, but re-
 “ mained in the office to be called for, and it
 “ was held to be a valid and binding policy
 “ against the company, although not called
 “ for. The case was very fully consid-
 “ ered, and was decided upon the princi-
 “ ple that in such cases the intention
 “ of the parties is the controlling test;
 “ that the omission to deliver the physical
 “ possession of the instrument was not nec-
 “ essarily conclusive that no contract was
 “ made, and that whether there was a bind-
 “ ing contract, depended upon the intention
 “ of the parties. BLACKBURN, J., said :
 “ ‘ The mere affixing the seal does not
 “ ‘ render it a deed, but as soon as there are
 “ ‘ acts or words sufficient to show that it is
 “ ‘ intended by the party to be executed as
 “ ‘ his deed, personally binding on him, it is
 “ ‘ sufficient ;’ and this accords with all the
 “ ‘ authorities. * * * The learned coun-
 “ ‘ sel both in their original and supplemental
 “ ‘ brief put great stress upon the proposition,
 “ ‘ that a binding contract may be made
 “ ‘ without a physical delivery of the instru-
 “ ‘ ment evidencing the contract. The case
 “ ‘ just cited is an authority to that effect,
 “ ‘ and there are others.’ ”

Bierer v. Fretz, 32 Kansas, 329, by VALENTINE,
 J., at p. 333 :

“ It is not necessary in law, to make a
 “ contract operative and binding, that there
 “ should be an actual manual delivery of
 “ the instrument by one of the parties to the
 “ other; and this is true even where the in-
 “ strument is signed by only one of the
 “ parties as a deed of conveyance. But

“ where the instrument is signed by both
“ parties, as in this case, it may become
“ operative and be binding upon both parties
“ as a contract, although it may be retained
“ by only one of them, or be delivered to a
“ third person. All that is necessary in the
“ way of delivery to make a written instru-
“ ment signed by both parties operative and
“ binding is, that there shall be a mutual
“ understanding between the parties that
“ the instrument shall be operative and
“ binding between them.”

Fisher v. Hall, 41 N. Y., 416.

It was further contended below that there was no contract before 6th June, 1893, according to the terms of the Lease, because defendant was not obliged to deliver possession until plaintiff had furnished the guaranty fund (*fols.* 132, 133). As to this, it need be said only that it was the executed lease (finding Third at *fol.* 728) which was approved by defendant's stockholders on 15th February, 1893; and the plaintiff had in the Lease itself expressly covenanted to furnish the guaranty fund (Art. XXXV., *fols.* 111, 112). The contract is one of the elementary class where performance by one party is a condition precedent to performance by the other. The existence of the condition of prior performance of the promise on his side by one party does not prevent or destroy the contractually binding character of the agreement; and the promises are, at the moment they are made, each sufficient consideration for the other.

Wald's Pollock on Contracts (Williston's ed.), p. 322: “ When there is a contract made by mutual
“ promises, we may have to enquire whether, in
“ addition to each promise or set of promises being
“ the consideration for the other, the performance
“ thereof on the one side is not a condition, pre-
“ cedent or concurrent, of the right to claim per-

“formance on the other. There is no logical
 “reason why it should not be so, or why express
 “words should be required to manifest an inten-
 “tion that it should. Each party’s promise is the
 “consideration for the promise of the other, not
 “for the performance which is due by reason of
 “the promise.”

Northrup v. Northrup, 6 Cowen, 296, by SAVAGE,
C. J., at p. 297 :

“LORD MANSFIELD, in *Jones v. Barkley*
 “(*Doug.*, 690), makes three classes of cove-
 “nants; 1. Such as are mutual and inde-
 “pendent, where separate actions lie for
 “breaches on either side; 2. *Covenants*
 “*which are conditions and dependent on*
 “*each other, in which the performance of*
 “*one depends on the prior performance of*
 “*the other*; 3. Covenants which are mutual
 “conditions to be performed at the same
 “time, as to which the party who would
 “maintain an action must, in general, offer
 “or tender performance. I consider the
 “plaintiff’s covenant as clearly belonging to
 “the second class. The defendant’s cove-
 “nant was absolute.”

Dey v. Dox, 9 Wend., 129, by NELSON, *J.*, at
 p. 133 :

“The definition of a dependent covenant
 “or promise shews this: If A covenants to
 “do or to abstain from doing a certain act, in
 “consideration of the prior performance of
 “some covenant on the part of B, A’s
 “covenant is termed a dependent covenant,
 “because B’s right of suing A for a breach
 “of this covenant *depends* upon the prior
 “performance, or what is equivalent, of the
 “covenant to be performed by B, which,
 “from its nature, is termed a condition pre-
 “cedent. Now it is obvious that the cov-
 “enant of B is independent, because it
 “must be performed without reference to
 “the covenant of A, and for a breach of it,

“ A may recover damages without shewing
“ a performance himself.”

Meriden Britannia Co. v. Zingsen, 48
N. Y., 247, 252.

That the provision for the deposit of a guaranty fund was an absolute covenant was also recognized by plaintiff two months prior to the time it was actually furnished. By an agreement dated April 7th, 1893, between plaintiff and the Long Island Traction Company (plaintiff's exhibit 7, *fols.* 7644-7649), the Traction Company agreed to pay to such trust company as might be designated the sum of Four Million Dollars “ in discharge of the *obligation* to provide a guaranty fund *under the terms of the said Lease.*” (*fol.* 7646). The preamble conclusively recognized the Lease as an existing and binding obligation :

“ WHEREAS, the party hereto of the second
“ part (the plaintiff) is about to take possession of the property and franchises of The
“ Brooklyn City Railroad Company, *under a lease made and entered into on the 14th day of February, 1893*, whereby the said party
“ hereto of the second part *has covenanted and agreed* to pay over to certain trust
“ companies, upon taking such possession,
“ the sum of Four millions of dollars as a
“ guarantee fund for its faithful performance
“ of its covenants and agreements as lessee.”
(*fols.* 7644, 7645).

All of this record evidence, as well as the conduct of the parties at the time subsequent to the execution of the Lease, shows that the Lease as a binding contract took effect when it was executed as such. It embraced a series of covenants, some to be performed before the commencement of the term of 999 years (*e. g.*, Arts. XXXV, XLVII, *fols.* 111, 132), others at the time of its commencement (*e. g.*, Art. XI, *fol.* 79), others still while it

should continue (*e. g.*, Arts. XXVI and XXVII, *fols.* 98-101), and again others when this long term should have expired (*e. g.*, Arts. XXIII and XXIV, *fols.* 95-97), each of which was to be performed in its own order, the performance of some being dependent upon the prior performance of others. But the single contract or scheme involving all of these covenants was made and entered into on 14th February, 1893, and the statutory ratification completed on 15th February, 1893. Whether the requests for expenditures made on and subsequent to 16th February, 1893, be considered as effective directly under Art. V of the Lease (as we submit that they were), or effective as subsequent modifications of the time prescribed by Art. V, is in the result wholly immaterial. The important thing is, that no such iniquitous result as flows from the judgment rendered below, was ever contemplated by the parties to the Lease.

POINT X. [*First Principal Question.*]

Plaintiff can recover no judgment whatever in this suit except through the equitable relief of an avoidance of the Tripartite Agreement. Any relief will be accorded only upon condition that plaintiff itself do equity.

And, finally, we submit that there is another and entirely conclusive demonstration of the error of the Referee. It has been already shown in the statement of facts—and it will in the next chapter of this brief, be demonstrated upon the law—that the Tripartite Agreement between plaintiff, defendant and the Traction Company executed on 17th August, 1894, established a binding adjustment between the parties with respect to conversion ex-

penditure, which, if that agreement were valid, was a complete bar to any recovery whatever by plaintiff. Plaintiff, in its complaint, ignored the Tripartite Agreement; it did not sue to set the agreement aside. But it sued upon a strictly common law cause of action, alleging (1) defendant's breach of the agreement to spend in conversion \$6,000,000 proceeds of the new securities and (2) plaintiff's damage by reason of such breach. When the agreement was produced by defendant under its defence in the answer setting it up, plaintiff attacked it on the ground that it was void, because its execution by plaintiff had been authorized by a board of directors some of whom owned stock of the defendant. The Referee, for that reason, held the agreement, not void, but voidable; and in effect the Referee's judgment included an adjudication in equity setting aside the Tripartite Agreement. It will presently be shown, upon ample authority (*infra*, at pp. 190-192), that that agreement was at law completely binding upon the plaintiff. For it was authorized by its directors; and the authorization was within the scope of the directors' legal authority. It could be attacked only in equity.

In effect, therefore, the plaintiff has succeeded upon an equitable cause of action as an indispensable preliminary to its recovery upon a legal cause of action. But according to one of the most familiar and beneficent rules of equity, plaintiff could have no such equitable relief unless upon the condition that plaintiff itself do equity. Plaintiff could not procure the Tripartite Agreement to be set aside because that agreement was inequitable as against it, unless—the agreement being set aside—plaintiff should surrender any inequitable advantage in its favor which the abrogation of the Tripartite Agreement might involve. This doctrine, we submit, is clear upon authority.

Barr v. N. Y., L. E. & W. R.R. Co., 125 N.Y., 263, by GRAY, J., at page 277:

“ I have said that this contract of lease
 “ was voidable and not void, and, therefore,
 “ could be and was, upon the showing of
 “ this record, validated by acquiescence and
 “ adoption. It was a good enough contract
 “ at law, but because of the immorality of
 “ directors, common to both contracting
 “ companies, combining to procure the exe-
 “ cution of a contract in which they were
 “ personally interested, a court of equity
 “ could interfere and set it aside at the in-
 “ stance of the injured party. The right,
 “ however, to invoke equitable interference
 “ of the courts depends upon the circum-
 “ stances of the case, and aid will be denied
 “ where, in a case like the present one, the
 “ contract has been executed, unless the
 “ party claiming to be injured acts dili-
 “ gently, in asserting a right to rescind, and
 “ honestly, by yielding up what came to it,
 “ and continues to be held and enjoyed
 “ under the contract.”

Duncomb v. N. Y., Hou. & N. R. R. Co., 84 N. Y., 190, by FINCH, J., page 199.

“ But the rule was adopted to secure jus-
 “ tice, and not to work injustice; to prevent
 “ a wrong, not to substitute one wrong for
 “ another; and hence have arisen limitations
 “ upon its operation calculated to guard it
 “ against evil results as inequitable as those
 “ it was designed to prevent. Thus, the
 “ beneficiary may avoid the act of the
 “ trustee, but cannot do so without restor-
 “ ing what it has received (*York Co. v.*
 “ *McKenzie*, 8 B. Par. Cas., 42). To cling
 “ to the fruits of the trustee’s dealing while
 “ seeking to avoid his act; to take the bene-
 “ fit of his loan and yet avoid and reverse its
 “ security, would be grossly inequitable and
 “ unjust. It would turn a rule designed as
 “ a protection into a weapon of offence and
 “ injustice.”

Steinway v. Steinway, 2 App. Div., 301, affirmed on opinion below, 157 N. Y., 710, by BARRETT, J., at page 306 :

“ To permit the plaintiff here to benefit
 “ from the ownership by the corporation of
 “ the very valuable Hamburg plant, and
 “ the many other advantages surrendered
 “ by the defendant Steinway, and at the
 “ same time allow him to strip that defend-
 “ ant of every vestige of profit secured by
 “ the risk of capital and the labor of nine
 “ years, would be grossly unconscionable.
 “ It would, in fact, be a fraud upon the de-
 “ fendant.”

Remington & Son Pulp & Paper Co. v. Caswell,
 126 App. Div., 142, by SPRING, J., at p. 149:

“ There is no sanctity hedged about a cor-
 “ poration. If it resorts to a court of equity
 “ it must appear that justice demands the
 “ relief which it seeks. The stockholders of
 “ a corporation may ratify and affirm the
 “ unauthorized acts of its directors and
 “ officers, and when they do so their adoption
 “ of these acts is effective to bind the cor-
 “ poration, unless they offend against the
 “ public or the rights of creditors are im-
 “ paired.”

SECOND PRINCIPAL QUESTION.

Plaintiff barred by the Tripartite Agree- ment.

The Tripartite Agreement is a sealed instrument (fols. 259, 260). It bears date and was executed on 17th August, 1894 (findings 54 at fol. 394 and A-18 at fol. 548). It was received in evidence at fol. 4429 and a copy of it was annexed to the answer

(*fols.* 204–268) which pleaded the agreement as a complete defense to plaintiff's entire cause of action.

Answer, pars. IX–XIII at *fols.* 183–194.

Exceptions specially presenting the Question.

The agreement is not mentioned in the Decision proper (*fols.* 724–746). But the questions about it which the defendant will argue are strictly raised in this Court, not only of necessity by the appeal itself from the money judgment which plaintiff has against defendant—and which could not have been rendered had defendant's contention as to the agreement been allowed—but specifically by defendant's exceptions, as follows :

1. Exception 10th at *fol.* 766 to finding fourteenth (*fols.* 741, 742) that

“ there is a balance due and owing
 “ under the terms of said lease from
 “ the said defendant to the plaintiff of
 “ \$1,740,258.38 with interest * * *.”

2. Exception 14th at *fol.* 767 to Conclusion Fourth in the Decision (*fol.* 743, 744) that

“ there has been no accord and satis-
 “ faction between plaintiff and de-
 “ fendant of the claims, demands and
 “ accounts of said parties by and against
 “ each other.”

3. Exception 47th at *fol.* 785 to finding XLV for plaintiff at *fols.* 702.
4. Exceptions 48th, 54th, 55th and 56th at *fols.* 785–787 to findings XLVI, LII, LIII and LIV for plaintiff at *fols.* 702, 703, 707–709.
5. Exceptions 80th, 82nd, 83rd, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 146th, 147th, 148th, 151st, at *fols.* 794–800, 815–816 to Referee's refusals to find according to defendant's requests 40 (*fols.*

- 363, 364), 45 (*fols.* 377, 378), 47 (*fols.* 382, 383), 54 (*fol.* 393), 55 (*fols.* 394-396), 56 (*fols.* 396, 397), 57 (*fols.* 397, 398), 58 (*fols.* 398, 399), 59 (*fols.* 399, 400), 62 (*fols.* 406, 407), 63 (*fols.* 407, 408), 70 (*fol.* 419), 71 (*fols.* 419, 420), 72 (*fols.* 420, 421), A-59½ (*fol.* 614), A-59¾ (*fol.* 615), A-60 (*fols.* 615, 616), and A-62 (*fols.* 618, 619).
6. Exceptions 117th, 118th, 119th, 120th, 128th, 133rd, 137th, at *fols.* 806, 807, 809, 811, 812 to Referee's refusals to make conclusions of law according to defendant's requests 7 (*fols.* 637, 638), 8 (*fol.* 638), 9 (*fol.* 639), 10 (*fol.* 640), 18 (*fol.* 645), 23 (*fols.* 647, 648) and 28 (*fol.* 650).
7. Exceptions at *fols.* 4605, 4658, 4670, 4671, 4672, 4688, 4690, 4698, 4699, 4700, 4701, 4737, to the admission of evidence to impeach the agreement (argued *infra*, at p. 371).

The Facts [*Second Principal Question.*]

The parties to the Tripartite Agreement (*fols.* 204-268) were the defendant of the first part, the plaintiff of the second part and The Long Island Traction Company, of the third part. The Traction Company then owned all the stock of plaintiff, and the agreement so recites (Agreement, *fol.* 205; findings A-8, A-9 at *fols.* 537-539). We have already given a synopsis of this second fundamental document in the case (*supra*, pp. 40-45).

We shall, for the convenience of the Court, state rather fully the facts which preceded the making of the agreement. But what is essential to an understanding of the instrument for the purposes of this part of our argument is very simple, consisting of four facts :

1. That at that time defendant had definitely

completed and stopped its expenditure upon "conversion." No such expenditure has been made since; so that, if any money to-day be due from defendant on account of conversion, it was likewise due on 17th August, 1894; and

2. That plaintiff's supposed cause of action for the principal sum of \$1,740,258.38, as now asserted and arising, as plaintiff alleges, by reason of plaintiff's own payments was no less in existence on 17th August, 1894, to the extent of \$1,176,773.60—that is to say, to the extent of 67 per cent. thereof.
3. That, immediately prior to the making of the agreement, questions arose between the parties as to whether defendant had fully met its obligation, under the Lease, to provide cost of conversion; and defendant claimed that it had overpaid the amount of its obligation.
4. That an accounting was then carried on between representatives of the two companies, and that their calculations led to the result that defendant's claim of overpayment was correct to the amount of \$308,340.35.

Defendant submits that here was a clear accord and satisfaction or a binding adjustment, by whatever legal name it may be called. Or there was, between the parties, made a new agreement with ample consideration moving from defendant to plaintiff outside of such adjustment, and which, so outside of it, was ample to sustain the agreement. And the defendant further asserts that, as the Tripartite Agreement called upon defendant to advance moneys and as, under that agreement, defendant did advance moneys for plaintiff's benefit, and as plaintiff accepted and retained the benefits of the

agreement, it is estopped to deny the adjustment made by it or any legitimate effect of that adjustment.

In corroboration of these propositions we shall now give the facts which led up to the making of the agreement. The Referee found in his modification of defendant's forty-fifth request at *fol.* 378, 379—

“That during the year 1894 there was
“an examination of the accounts of the
“plaintiff and the defendant which led up
“to and embraced the so-called tripartite
“agreement, attached to the Answer of the
“defendant and marked Exhibit ‘A.’”

On 17th August, 1894—on which day the agreement was executed—more than eighteen months had elapsed since the execution of the Lease on 14th February, 1893; and it was more than fourteen months since, on 6th June, 1893, possession of the property had been delivered to the plaintiff and the Lease had “taken effect.” During the interval, 14th February—6th June, defendant had paid in cost of “conversion” done during that interval the sum of \$1,481,057.58 (findings A-2 at *fol.* 534, A-34 and A-35 at *fol.* 558, 559, and at A-75 at *fol.* 628).

Defendant's total "conversion" expenditure after 14th February, 1893, was "not less than" \$6,400,527.14, made up as follows:

" Direct disbursements of defendant	\$1,767,574.49
" Advanced to plaintiff for payrolls	1,084,435.58
" Advanced to plaintiff in cash...	3,213,049.43
" Supplies as per inventory.....	251,335.59
" Interest on moneys necessarily bor-	
" rowed for conversion.....	4,132.05
" Payments for generators, July 8,	
" 1893	50,000.00
" Payments for generators, August	
" 21, 1893	30,000.00
	<hr/>
	" \$6,400,527.14"

Finding A-36 at *fol.* 560, 561.

Plaintiff may object that such \$6,400,527.14 may have included payments which, although made after 14th February, 1893, were for conversion work done before that date. The objection we have already argued (*supra*, p. 117), and shall argue again (*infra*, p. 280), to be untenable. However the findings establish that defendant's payments for work done *after* 14th February, were as much as \$6,107,808.85 consisting of \$1,481,057.58 cost of work between 14th February and 6th June (finding A-75 at *fol.* 628) and \$4,626,751.27 done after 6th June (finding XXXVIII at *fol.* 694). Defendant made no conversion expenditure after 1st August, 1894 (finding A-5 at *fol.* 535, 536). So that, in any event, the cost of conversion paid by defendant after 14th February, exceeded on 17th August, 1894, the sum of \$6,000,000.

If, therefore, there be to-day any deficiency in defendant's expenditure under the Lease, that very deficiency also existed on 17th August, 1894, and was a fact before the parties, when the Tri-

partite Agreement was made ; and it was in view of it that that agreement was made as it was.

So the plaintiff or the Disbursing Committee before 17th August, 1894, had made in far the larger part the "conversion" expenditure of \$1,740,-258.38, for which principal sum the Referee gave a judgment. That full sum was not expended by plaintiff (or the Disbursing Committee) until 26th October, 1894 (supplemental finding 1 at *fol.* 712, 713); but it appears from finding A-42 (*fol.* 567-572), into which as part thereof the Referee incorporated Plaintiff's Exhibit 1162 printed at *fol.* 7758a-7955 (pages 2586 l-2652 of Case on Appeal), that the portion of plaintiff's (and the Committee's) expenditure made prior to 17th August, 1894, amounted to \$1,176,773.60,* which forms part of the principal sum recovered below in this action. Prior to 17th August, 1894, plaintiff had made no request of defendant for expenditure on "conversion" which was not complied with by defendant (finding A-44, *fol.* 581, 582). And plaintiff's own large expenditure (including the Committee's) of \$1,176,773.60 made prior to 17th August, 1894, and thus without any prior request upon defendant, would seem to make clear that, during such expenditure, plaintiff did not suppose that it had any right to call upon defendant for any further conversion expenditure.

Findings 41-43, at *fol.* 364-375.

At any rate—and these are the main facts to understand at this stage of the argument of this question—it is clear that, on 17th August, 1894, when the Tripartite Agreement was made, plaintiff's right to request from defendant any payment of cost of "conversion" was as great as when this suit

* This figure is also and more briefly derived from Defendant's Exhibit 1485, being plaintiff's general ledger, containing the entries relative to "Brooklyn City Construction" (*fol.* 7410, 7411), the entries producing it being printed in the record on appeal at *fol.* 9454, 9455, 9458.

was brought; and that plaintiff's cause of action for the alleged and recovered expenditure of \$1,740,258.38 was then, as to \$1,176,773.60—that is to say, as to more than 67 per cent. thereof, in as complete existence as it is to-day; and that the amount allowable to defendant against the \$6,000,000 was discussed and mooted between the parties before the agreement was made.

Defendant submits that, reading the agreement of 17th August, 1894, with no more than such facts thus found by the Referee, there is conclusively established upon the face of it a complete adjustment, whether in form of an accord and satisfaction or a release or otherwise, of the claim—if any valid claim there were—which plaintiff then had for “conversion” expenditure by defendant. If proof of such agreement settling the parties' accounts were required even more conclusive than the making and payment of the note for \$308,340.35 given to defendant under the Tripartite Agreement on account of indebtedness therein recited, it is found in the provision of the Agreement that *plaintiff* should pay the \$347,036.44 which constituted defendant's obligations upon conversion contracts under which work was prosecuted by plaintiff, which would clearly have been payable by defendant, had it not completely expended all that was required of it under the Lease. And that such was the understanding of the plaintiff and defendant and the persons who represented defendant appears not only by the text of the agreement but by other record evidence and by the undisputed testimony of all the witnesses having knowledge on the point, whether called by defendant or by plaintiff.

We beg the Court to remember that we are not, in this chapter of our argument, discussing, as we shall elsewhere (*infra*, pp. 297–336), the claim—which plaintiff first raised immediately before this

suit was brought and nearly six years after the making of the Agreement—that the accounts, whether intentionally or unintentionally, were wrongly understood and wrongly stated in August, 1894. What we are, at *this* stage of the case concerned with is to understand *what agreement* it was that the plaintiff and defendant, or those representing them, then had in their minds and *meant* to make. Plaintiff's argument that plaintiff was betrayed by the incompetence, carelessness or dishonesty of its directors, seduced by their interest as stockholders of defendant, is a different question with which, in the points following, we shall very fully deal. But at present we are concerned to have the Court understand what—whether right or wrong—was the *intent* of the agreement of 17th August, 1894, and what were the circumstances which led up to it or under which it was made.

We first cite record evidence amplifying the Referee's finding 45 (*fols.* 377–380) already quoted, that—

“ during the year 1894 there was an examination of the accounts of the plaintiff
 “ and the defendant which led up to and
 “ embraced the so-called tripartite agreement * * * .”

On 6th June, 1893, the very day when plaintiff took possession under the Lease, plaintiff's directors resolved (finding 33 at *fols.* 357–358) :

“ that all questions relating to the adjustment of the accounts between this Company, as lessor, and the Brooklyn Heights Railroad Company, as lessee, * * * be and the same hereby are referred to the Executive Committee of this Company with power.”
 And also (*fol.* 1044) “ that all questions upon matters of administration under the lease dated February 14, 1893, between this Company and the Brooklyn City Railroad

“ Company be and the same hereby are re-
 “ ferred to the Executive Committee of this
 “ Company with power.”

On 20th March, 1894, at a meeting of plaintiff's Executive Committee (finding 41 at *fol.* 364-367):

“ The General Manager stated that the
 “ Company would require within a short
 “ time additional funds to pay on account of
 “ construction, &c., as follows: * * *
 “ \$707,128.72. *That the Brooklyn City's*
 “ *funds for this purpose were about ex-*
 “ *hausted*, and suggested that authority be
 “ given to the officers of the Company to
 “ borrow on the credit of the Company the
 “ sum of \$500,000.”

A resolution giving such power was then adopted (same finding at *fol.* 367). At a meeting of such Executive Committee on 10th April, 1894, the General Manager was asked to make at the next meeting a statement of the

“ money that would be required within a
 “ year for the completion of the Power
 “ Stations, Equipment, reconstruction of
 “ tracks, extensions of roads, &c.” (finding
 42 at *fol.* 367, 368).

At the committee's meeting held a week later, 17th April, 1894, the general manager (finding 43 at *fol.* 369-375) presented his report, giving the details of what money would be needed for electrification and other construction, the total amount at that time being \$3,231,076.50. The record of the meeting then proceeded (same finding at *fol.* 374, 375):

“ it was the unanimous opinion of the
 “ Committee that some comprehensive finan-
 “ cial plan should be adopted that would not
 “ only care for present necessities, but also
 “ for the necessities of the future. It was

“decided that the Pres’t confer with the
 “Vice-Pres’t of the Brooklyn City Co. with
 “a view to holding a joint meeting of the
 “Exec. Committees of both companies, and
 “with a view to formulating some suitable
 “plan covering the requirements.”

Later, on 13th August, 1894, the plaintiff’s board of directors adopted a resolution (finding 46 at *fols.* 381, 382) :

“that the President appoint Messrs. Jenkins, Young and Bailey, to confer with the
 “Brooklyn City Railroad Company and to
 “examine into the accounts between the
 “Companies so as to determine the amount
 “of the so-called surplus fund, and the
 “method of reimbursing or paying the
 “same, with instructions to report to the
 “Board.”

Still later, on 16th August, 1894, plaintiff’s board of directors authorized its officers to join with the Long Island Traction Company in the execution of the note of August, 1894, for \$308,340.35 to be given pursuant to the Tripartite Agreement in part payment of plaintiff’s debt to defendant for over-payment of conversion cost (finding 61 at *fols.* 404-406). And on the same day (finding 65 at *fols.* 410-412) plaintiff’s board authorized its officers for plaintiff to join with the Long Island Traction Company in borrowing from defendant \$250,000 and giving defendant a note therefor, the money to

“be used in paying the obligations of the
 “Brooklyn City Railroad Company *payable*
 “*but not yet discharged by this Company.*”

And after the execution of the Tripartite Agreement, on or about 15th September, 1894, the Long Island Traction Company, which, with plaintiff and defendant, was a party to that Agreement, issued a circular to its stockholders (who must have been in

a large part stockholders in the defendant—90 per cent. of the Traction stock having been open to subscription by defendant's stockholders) which stated that (finding 51 at *fols.* 387, 388):

“ *Besides disbursing the moneys realized*
“ *from the sale of the increased capital stock*
“ *and of the consolidated bonds of the Brook-*
“ *lyn City Company, the Heights Company*
“ *has expended out of its own funds a sum*
“ *exceeding \$1,000,000, and will be required*
“ *to spend before the electrical conversion is*
“ *completed a large additional amount.*”

Thus it was plainly the understanding of all parties that the amount to be paid by defendant under the Lease had been exhausted, and that all further conversion expenditures must be made by plaintiff.

That the Tripartite Agreement when made had been “led up to” and by was “embraced in” the examination of the accounts between plaintiff and defendant, and that the directors, in making the agreement, considered and passed upon the state, at that time, of defendant's expenditure under Arts. IV and V of the Lease, are shown not only by the Referee's finding 45, *fols.* 378–380 (*supra*, p. 155), and the records just quoted, but also by uncontradicted evidence of several most respectable witnesses from which we shall presently quote. Such evidence makes it clear beyond a doubt that, in the accounting immediately prior to 17th August, 1894, between the two companies which were ended by the agreement:

1. It was decided that defendant had fully expended upon “conversion” the full sum of \$6,000,000 called for by Art. V of the Lease, in addition to such amount, if any, as was applicable to cost of “conversion” by defendant under Art. IV; and that

2. It was decided that defendant had, for "conversion," expended a further sum in excess of the requirements of the Lease, such sum amounting to \$308,340.35, for which amount the Tripartite Agreement required the plaintiff to give, as the plaintiff did in fact give, the defendant its note; and that
3. It was consequently decided that the other and additional obligations incurred by defendant for conversion and which amounted to \$347,036.44, should be assumed and paid by plaintiff under Art. XXII of the Lease.

Plaintiff meets—and the Referee met—all of the proof submitted by defendant to this effect, by the insistence that members of plaintiff's board of directors, when it dealt with these matters, held shares of stock in the defendant company which gave them an interest adverse to the plaintiff company and consequently that the agreement and all they did in performance of it, and upon which defendant now relies, may be repudiated by plaintiff. And that question we are, later on, to argue. But at this preliminary point our concern is that the Court shall clearly understand what in fact it was that the plaintiff and the defendant and those who acted for them—whether wrongly or rightly—meant by, and meant to include in, the Tripartite Agreement. If that fact be not sufficiently clear upon the face of the agreement and the proceedings already quoted, it is made clear beyond discussion by the testimony of the witnesses now to be cited.

Such witnesses were not examined on this subject until on and after 20th May, 1904 (*fol.* 3149)—that is to say, not until ten years after the event. Of the directors and accountants who took part in the discussions and examinations prior to 17th August, 1894, which resulted in the tripartite

agreement on that day executed, there had died W. A. H. Bogardus (*fol.* 4457), Thomas P. Swin (*fol.* 7487), E. W. Bliss (*fol.* 5335) and Felix Campbell (*fol.* 5335). The transactions were complicated and technical. Notwithstanding these difficulties imposed upon defendant when it was called upon to defend the Tripartite Agreement, the testimony is ample and substantially uncontradicted as to what in August, 1894, the two companies understood to be the state of their relations and meant to do.

We have shown that, after 14th February, 1893, and before August, 1894, defendant had, as the Referee has found (findings A-5 at *fol.* 535, 536, and A-36 at *fols.* 560, 561), paid for conversion "not less than \$6,400,527.14"; and that the total cost of conversion done after 14th February, 1893, and paid for by defendant, was as much as \$6,107,808.85. So that, when, in early August, 1894, the parties and their representatives, from whom we are now to quote, came together for some adjustment of accounts, every one knew that defendant had expended for conversion done after 14th February much more than the sum of \$6,000,000 specified in Article V of the Lease.

Many years afterwards and in this suit, however, and in order to impeach the original fairness of the Tripartite Agreement, plaintiff claimed large deductions from defendant's payments, charged by it against its capital accounts, which, against defendant's earnest resistance, have been allowed by the Referee, although concededly not claimed by plaintiff in August, 1894. Those deductions included the payments which, at a later day were disputed, for February-June, 1893, conversion, and the allowances, also later disputed, for the \$308,340.35 note discussed *infra* at pp. 265-276 under the *Sixth Principal Question*, and the "Journal En-

tries," discussed *infra* at pp. 295-334 under the *Seventh Principal Question*.

But defendant's *actual* expenditure of more than \$6,000,000 is now undisputed, as it was in August, 1894. The only question then mooted was, to what extent defendant's payments over the \$6,000,000 exceeded or fell short of the amount, if any, which defendant was bound to expend under Arts. IV and XII of the Lease. Defendant's contention was that that article assured defendant and its stockholders the full amount of their surplus, and that the fact that as the surplus had been infringed on to the extent of \$308,340.35 by its payments for conversion was unanswerable proof that defendant had paid in full what could be asked under the Lease, and over and above that the sum of \$308,340.35. So it is that the discussion in August, 1894, proceeded upon the basis of defendant's payment in full of the \$6,000,000 under Art. V and of the full amount due under Arts. and XII, and, VI over and above that, of such sum of \$308,340.35—that being the depletion of defendant's surplus.

On this subject defendant examined—

David G. Leggett, who was then a director of defendant and member of its executive committee.

Fols. 5519-5545, 5593-5652, 5685-5692.

Edward Merritt, who was defendant's president.

Fols. 5546-5585.

Crowell Hadden, who was a director of plaintiff and member of its executive committee.

Fols. 5586-5593, 5727-5730.

Joseph S. Auerbach, who was plaintiff's counsel.

Fols. 5653-5685, 5693-5727.

Daniel F. Lewis, who in August, 1894, was plaintiff's president.

Fols. 5254-5273, 5303-5518, 7090-7145, 7186-7229, 7452-7473, 7477-7497.

Plaintiff, on the same subject, examined only—

Frank Bailey, who testified that he was a director of plaintiff for "a very short "time," who was named on plaintiff's committee to adjust accounts, and who, when asked whether the directors considered any accounting, answered "I can't "remember that there was or was not" (*fol.* 4700), and that he had "no distinct "recollection about what was done" (*fol.* 4701).

Fols. 4696-4703.

John G. Jenkins, who was one of plaintiff's directors, who said (*fols.* 4736, 4737) that he never knew of, or served on, such a committee for adjustment and gave no other substantive testimony.

Fols. 4735-4738.

Timothy S. Williams, who testified (*fol.* 4770) that he "first became associated with the "plaintiff in July, 1895," which was nearly a year after the making of the Tripartite Agreement, and who, of course, gave, and could give, no testimony as to the circumstances under which it was made. He testified with reference to the new investigation of the matter made after the change in plaintiff's control, and gave his interpretation of various instruments.

Fols. 4769-4861.

Alfred A. Noble, who was accountant for plaintiff, and gave information about the accounting investigations and discussions which preceded the making of the Tripartite Agreement. We rely upon this and shall quote amply from his testimony, which was absolutely the only testimony of personal knowledge produced by plaintiff bearing upon these matters.

Fols. 3149-3646, 3664-3834, 3974-3985, 4150-4232, 4249-4282, 4342-4457.

We now briefly recapitulate the testimony of all of those witnesses who gave upon this subject any direct and material testimony.

Edward Merritt.

Mr. Merritt was, until not long before his very recent and lamented death, the well-known president of the Long Island Loan & Trust Company (*fol.* 5546). He became defendant's president *pro tem* in February, 1894, and president on 25th May, 1894 (*fol.* 5546). He, Mr. Leggett and Mr. White for the defendants with their counsel, Mr. Trull, met many times with Mr. Lewis and Mr. E. W. Bliss, representing plaintiff and Mr. Auerbach, their counsel; and at those meetings discussions were had which "led up to the forming of the tripartite agreement" (*fol.* 5550). He further testified (*fol.* 5551):

"*By the Referee:* Q. Was there anything
"said in those meetings on the subject of
"whether the six millions provided for by
"the lease had been exhausted? A. It
"was; that was the main subject of discus-
"sion. Claimed by us that it was ex-
"hausted, and not disputed by them in any
"way, shape or manner; that we not only

“ had exhausted the fund provided in the
“ lease by the sale of the stock and bonds,
“ but had overpaid them some \$300,000
“ about * * *.”

On cross-examination Mr. Merritt admitted that his conclusion about the fund was based, not upon personal knowledge of the accounts, but upon information provided him by Mr. Swin, defendant's treasurer (*fols.* 5558–5560) or Mr. Bogardus, plaintiff's secretary and treasurer (*fol.* 5565). But upon the present point that is, of course, immaterial. Mr. Merritt was not called to prove what *in truth* was in August, 1894, the true state of the accounts between plaintiff and defendant, but what was *then assumed and agreed to be* the state of the accounts for the purposes of the Tripartite Agreement. Later on we shall discuss the true state of the accounts.

Nor is it material that Mr. Merritt in August, 1894, as he stated on cross-examination (*fols.* 5562, 5563), proceeded—

“ on the theory that, irrespective of the
“ moneys that might have been on hand at
“ the date of the lease, or at the time the
“ property was turned over to the Brooklyn
“ Heights, the City Company had the right
“ to retain out of any funds or any proceeds
“ of stock and bonds or anything else in its
“ hands, the total amount of its surplus and
“ distribute that to its stockholders.”

If it were here material, we should submit it to be clear that Mr. Merritt, in his assumption, correctly interpreted the provisions of Arts. IV and V of the Lease. It is strictly true that any payment by defendant of cost of conversion which depleted its surplus was to that extent an over-payment. But that is for another chapter of our argument. We are here concerned, as we have said, only with what the parties and

those representing them then—when they made the Tripartite Agreement—supposed, or assumed to be, the state of the account. Undoubtedly they were much concerned—but, for this part of our argument, it is immaterial whether rightly or wrongly—with the so-called “yellow sheet,” defendant’s exhibit 56 (vol. 8, p. 3183), which showed the condition of defendant’s surplus and was before the parties in August, 1894, and of which we shall presently give some account (*infra*, p. 175).

Crowell Hadden.

Mr. Hadden was a member of plaintiff’s executive committee. Referring to the meetings before the making of the Tripartite Agreement, he said (*fol. 5587 et seq.*):

“The object of the meetings was to consider
 “the financing and so on of this Brooklyn
 “City Railroad deal * * * (*fol. 5588*)
 “they were to issue three million of stock
 “and three million of bonds, the pro-
 “ceeds to go to the electrifying of the
 “road, and they had spent all of that money
 “and had also spent some of their surplus
 “in the construction. They claimed to
 “have over-spent in the work of conversion
 “something over \$300,000 out of their sur-
 “plus and direct obligations, and as much
 “more probably, over \$600,000. *The re-*
 “*sult was this Tripartite Agreement was*
 “*then framed* * * * (*fol. 5592*). I can’t
 “say I ever heard any assertion on the part
 “of the Heights Company that the City
 “Railroad Company was indebted to it
 “under a bond issue provided by its lease
 “prior to the beginning of this suit.”

Joseph S. Auerbach.

Mr. Auerbach was plaintiff’s counsel from before the Lease was made until after the making of the

tripartite agreement. He attended for plaintiff, with its other representatives, the meetings for discussions which preceded the latter. There were, he said, "a good many" of them. He testified:

(*Fol.* 5675) "Nobody in any of these
 "conferences claimed or suggested that the
 "Brooklyn City Company owed any further
 "advances or moneys to this work * * *"
 "(*fols.* 5676, 5677) In order to arrive at
 "what the financial condition was the coun-
 "sel had a statement made by an account-
 "ant, and that was gone over and discussed
 "and accepted and made the basis of the
 "financial plan between the companies set
 "forth in that circular and the tripartite
 "agreement * * * (*fols.* 5680, 5681)
 "there was a debate back and forth as to
 "the amount there was due, and it was left
 "to Mr. Phelps to ascertain it. The amounts
 "were agreed upon, and notes given for the
 "amount."

NOTE: In Mr. Auerbach's cross-examination, he was asked with reference to plaintiff's ex. 1440, which was the report made by the accountant Phelps in June, 1894, and which contained this statement (*fol.* 5718, plff's ex. 1440 at *fol.* 8014):

"The account of the Brooklyn
 "City Railroad Company shows the
 "balance due from them on ac-
 "count of construction and conver-
 "sion, partly estimated, \$1,059,-
 "154.55."

This was put to Mr. Auerbach as inconsistent with his understanding that the Brooklyn City had in August, 1894, paid for conversion more than could be asked for under the Lease. But plff's exs. 1440 and 1440a, the latter being the full chapter of the Phelps account on relations between the two companies, re-

ferred to a very different thing from the \$6,000,000 under Art. V of the Lease and the sum, definable under Art. IV, which defendant was bound to advance on request for cost of conversion.

The Lease, Art. X (*fols.* 78, 79) provided that, at the expiration of the Lease (999 years) or the sooner termination thereof, the defendant on taking over permanent improvements paid for by plaintiff during the duration of the Lease, should pay plaintiff their cost. What plaintiff paid out, therefore, for such improvements, whether conversion or otherwise, was carried on plaintiff's books as a charge against defendant, although not payable unless and until plaintiff should surrender back the property on the termination of the Lease. Plaintiff does not base its claim here in suit upon any such *contingent claim* as that to which Mr. Phelps certified. If plaintiff had sued on its contingent claim, the amount of the claim would have been far greater. For the amount of it was \$3,248,065.75 on 30th June, 1897 when plaintiff reported to the Railroad Commission (finding 88 at *fol.* 518), and was \$4,978,284.88 on 30th June, 1898, when plaintiff again reported to that Commission (finding 89 at *fols.* 518, 519).

The Phelps reports, Plaintiff's Exhibits 1440 and 1440a (*fols.* 8011-8061) did not undertake to give—they did not even refer to—defendant's obligations under Art. IV or Art. V of the Lease to advance money on cost of conversion. Those accounts give on one side what plaintiff had itself paid out for conversion and on the other side its receipts against such payments, including principally defendant's cash advances to plaintiff. They did not give the \$6,000,000 or any other sum representing defendant's obligation under Arts. IV and V of the Lease or set off what defendant had actually paid against such \$6,000,000 or other sum. Those accounts did not give, or purport to give, the full amount

of defendant's advances against such \$6,000,000. They gave such advances only so far as made on and after 10th January, 1894 (*fol.* 8056). Phelps had examined the Brooklyn City accounts. Plaintiff's witness Noble testified that Phelps had also examined the books themselves (*fols.* 4415, 4416), although later testifying that Phelps had examined only the "Brooklyn City accounts" (*fols.* 4445, 4446). At any rate he made what he deemed a sufficient examination. And apparently he, although an entirely neutral accountant, was satisfied that the Brooklyn City's obligations had all been met, and that plaintiff's further expenditures were only a contingent charge against it (Noble, *fol.* 4452).

In fact the examination of Phelps was made for the New York Guaranty & Indemnity Company, the trustee under the proposed collateral trust mortgage (*fols.* 4269, 4421-4425), which was executed on 1st August, 1893, and under which was pledged

" All the right, title and interest
 " of the Heights Company in and
 " to the amount of the cost of all
 " property * * * acquired and
 " paid for by said Heights Com-
 " pany out of its own funds * * *
 " such cost, as aforesaid, being pay-
 " able under the terms of the lease
 " * * * by said lessor company
 " to said lessee company in the
 " event of the expiration of said
 " lease or other sooner termination
 " thereof" (*fols.* 8857-8859).

The Phelps' report, therefore, amounted to this: That the \$1,059,154.55 was due and payable, not presently out of the proceeds of the stock and bonds, but only at the expiration of the Lease. And the account, therefore, completely sustained, and perhaps even contributed to, the position and understanding of both plaintiff and defendant

when the Tripartite Agreement was executed.

We may add that, in the circular issued by the directors of the Traction Company (being the same persons as plaintiff's directors) to the stockholders of that company on 15th September, 1894, there was the following statement (finding 51 at *fols.* 384, 387, 388):

“ Besides disbursing the moneys
“ realized from the sale of the in-
“ creased capital stock and of the
“ consolidated bonds of the Brook-
“ lyn City Company the Heights
“ Company has expended out of
“ its own funds a sum exceeding
“ \$1,000,000 and will be required
“ to spend before the electrical con-
“ version is completed a large
“ additional amount.”

Daniel F. Lewis.

Mr. Lewis in August, 1894, was president of plaintiff and of the Traction Company, and in the negotiations preceding the making of the Tripartite Agreement was one of the representatives of those companies, but not of defendant. He testified (*fols.* 5319, 5320) that the books were examined by Messrs. Swin, Bogardus and Noble, and (*fol.* 5342) that their reports were discussed at the meetings. Referring to the note for \$308,340.35 he testified (*fol.* 5348) that it—

“ was given to repay the Brooklyn City
“ Company for an amount which they had
“ paid from their surplus account, and which
“ amount was in addition to the proceeds of
“ the bonds and stock provided for in the
“ lease.”

Mr. Lewis was severely cross-examined (*fols.* 5354–5518, 7119–7131, 7197–7229) by plaintiff's

counsel with regard to his permitting the allowance to defendant, when the Tripartite Agreement was made, of the amounts of the so-called "journal entries" and as to the allowance to defendant of "its surplus" out of its cash assets. We elsewhere (*infra*, pp. 297-336) defend what was then done about those matters. But again we beg to point out that we are concerned in this part of the argument only with the claim of the defendant then made and the concession of plaintiff then made—quite without regard to their being right or wrong. And Mr. Lewis' testimony, like all the rest, makes clear that the mutual understanding and agreement was that defendant had on 17th August, 1894, advanced as much as \$308,340.35 beyond the requirements of the Lease.

Alfred A. Noble.

The same sufficiently appears in the testimony of Mr. Noble, who was called by the plaintiff. He came into plaintiff's employ as its accountant about 1st September, 1893, and remained until January, 1897 (*fol.* 3150). In his examination on the present topic, plaintiff's counsel sought to show that there was, in preparation for the Tripartite Agreement, no sufficient examination of the accounts showing what defendant had already paid on conversion. Had counsel succeeded, their success would have been immaterial. Whether the examination of accounts by those representing plaintiff were sufficient or insufficient—or none at all—is immaterial; the question is what, rightly or wrongly, for reasons whether good or bad, the two parties or those acting for them, predicated as the state at that time of the conversion fund which Arts. IV and V of the Lease required defendant to provide. Was it exhausted? Was it more than exhausted by \$308,340.35?

And as to this Mr. Noble, though testifying for plaintiff, left no doubt. He did not himself make up any definite account for the purposes of the Tripartite Agreement (*fol.* 4438). Mr. Bogardus, since dead, was his "superior in the accounting department" (*fol.* 4251). A special account was, according to his testimony, prepared by Mr. Phelps, a public accountant acting for the New York Guaranty & Indemnity Company (*fol.* 4421, 4422). But Mr. Noble himself "prepared a number of statements at that time, but not all relating to this particular matter" (*fol.* 4269). He testified further (*fol.* 4267, 4268):

"I was not consulted at all with reference to this agreement. I do not recollect whether Mr. Swin" (one of defendant's accountants, since dead [*fol.* 5313, 7487]) "or I prepared the figures of any statements upon which it was based. *I undoubtedly went over them with Mr. Swin.* The statements were prepared previous to the execution of this agreement by me and Mr. Swin."

On cross-examination Mr. Noble expressly admitted the entirely undisputed fact upon which, at this great length, we are here insisting. He testified at *fol.* 4272, 4273:

"Q. Have you not repeatedly said that *all these accounts were thoroughly thrashed out before the final adjustment in August, 1894?* A. Yes.
"Q. Between the two companies? A. Yes.
"Q. That statement by you is true? A. Yes."

On re-direct plaintiff's counsel sought to break the force of this statement of Mr. Noble, although

he was their own witness, but in vain (*fol.* 4408, 4409):

“Q. In answer to Mr. DeWitt the other
“day, you testified as follows: ‘Q. Have you
“‘not repeatedly said that all these accounts
“‘were thoroughly threshed out before the
“‘final adjustments in August, 1894? A.
“‘Yes. Q. Between the two companies?
“‘A. Yes.’

“Q. What did you mean by threshed out?
“A. The accounts had been examined by the
“representatives of the companies.

“Mr. Bogardus and Mr. Swin were the
“representatives of the companies, Mr.
“Bogardus representing the Heights and
“Mr. Swin the City Company, and also the
“committees appointed by the companies.

“Q. What accounts did the Committees
“examine? A. The ones included in the
“statement, in Exhibits 2 and 4.

“And all of the accounts had been ex-
“amined by Mr. Swin and Mr. Bogardus,
“frequently, and also by Mr. Lewis to some
“extent; in a general way Mr. Lewis kept
“informed as to the nature of the accounts.
“The third certificate that I prepared was
“never examined by these committees, but
“it was examined by Mr. Swin, in a general
“way.”

Mr. Noble on direct-examination for plaintiff and on cross-examination for defendant made clear the extent of the examination of accounts that was had between these companies prior to the Tripartite Agreement. Although Mr. Noble was not an officer of either company and had no deciding part in the accounting, yet he was a contemporary witness to the fact of the accounting, and in this case his testimony is of the more importance in that Mr. Swin and Mr. Bogardus, the responsible officials who made the calculations, were both dead at the time of the trial; and it is certainly to be relied upon against plaintiff not only because he was plaintiff's

own witness but also because Mr. Noble had never had any connection, whether as officer or otherwise, with the defendant company. His testimony given in amplification of the portion we have already quoted, is as follows :

“ Q. Who was investigating these accounts in 1894? A. Whom do you refer to; what committee do you refer to?

“ Q. I do not refer to any committee. I see Mr. Phelps was investigating? A. Mr. Phelps went over the entire period, as I recall, from June 6, 1893, to June 16, 1894.

“ Q. And were the officers of either company connected with him in this investigation of accounts? A. I presume so. The Brooklyn City R. R. Co. was a party to that investigation and the Heights R. R. Co. (fols. 4421, 4422).

* * * * *

“ Q. Now, in the general threshing out of accounts, in the account between the Heights and the City Company, to which I have referred, just previous to the 17th of August, 1894, the date of the Tripartite Agreement, these amounts for which the Heights Co. and the Traction Co. were to give their notes to the Brooklyn City Co. were contained in the account, were they not? A. Yes.

“ Q. And the notes were given for those amounts? A. Yes; * * * they were ascertained practically by the examination of the accounts in both companies.

“ Q. That was found to be the balance due? A. That is my understanding of the case, that at the time of the Tripartite Agreement the note for \$308,000 was given to the Brooklyn City to adjust their surplus at the time the companies came to an agreement. I was at work in connection with that business for some time. * * * Mr. Bogardus was with me, and Mr. Swin represented the company (fols. 4426-4428).

* * * * *

“ Q. When you say that it is your under-
 “ standing that this \$308,000 and this
 “ \$350,000 was arrived at between the two
 “ companies, how do you mean it was
 “ reached, between what officers of the
 “ companies? A. Between the proper offi-
 “ cers of the companies. They were all of
 “ the officers of the companies who were in-
 “ terested in it. Mr. Lewis certainly knew
 “ of the details of that adjustment.

“ Q. Did you know that any detailed
 “ statement was ever submitted to him
 “ which would show those results? A.
 “ Yes, and I believe Mr. Lewis had seen
 “ that *yellow sheet*.

“ Q. Did the *yellow sheet* contain any de-
 “ tails? A. It contains totals as I recollect
 “ it (*fols. 4440, 4441*).

* * * *

“ Q. Is it not a fact that the figures in the
 “ Tripartite Agreement were reached by Mr.
 “ Bogardus, Mr. Lewis and Mr. Swin? A.
 “ And verified by Mr. Phelps.

“ Q. Mr. Phelps' report does not show
 “ any such figures as are contained in the
 “ Tripartite Agreement, does it? A. It
 “ shows the requirements and specifies
 “ the disbursements up to a certain time
 “ (*fols. 4444, 4445*).

* * * *

“ Q. You have nothing to detract from
 “ the testimony received in response to my
 “ questions on your cross-examination? A.
 “ No. I may also add here that I also talked
 “ with Mr. W. A. H. Bogardus before his
 “ death in relation to these accounts, and
 “ since his death with Mr. Daniel F. Lewis,
 “ and I have talked with Mr. Swin.

“ Q. And these are the parties you had in
 “ mind when you said you had repeatedly
 “ stated that the matter had been thoroughly
 “ threshed out prior to the settlement in
 “ 1894? A. I had in mind my testimony
 “ from time to time. The accounts had
 “ been examined by committees from both

"companies, also by an expert accountant.
 "That is what I had in mind when the
 "statement was made. That had been
 "done before the adjustment in 1894. * * *
 "I have stated that the adjustment was sub-
 "mitted to the officers of the company; it
 "was also submitted to the Board of Direct-
 "ors of the company (*fols.* 4451, 4452).
 * * * * *

"Q. Mr. Noble, in answer to Mr. Trull a
 "moment ago you stated that this settle-
 "as he called it was submitted undoubtedly
 "to the Board of Directors. You meant by
 "that that the Tripartite Agreement was
 "submitted to the Board? A. Yes, and I
 "assume that to be the fact from the paper
 "itself, also from the entry relating to the
 "Brooklyn City surplus shown by the entry
 "prepared by Mr. Bogardus.

"Q. The entry where? A. On the Brook-
 "lyn Heights Books (*fols.* 4453, 4454)."

And in strict accord with all the testimony
 on this point, record and oral, which we have now
 given, was the Referee's finding 45 at *fol.* 378 that
 in 1894—

"there was an examination of the ac-
 "counts of the plaintiff and the defendant
 "which led up to and embraced the so-called
 "tripartite agreement * * *."

So much was said below by plaintiff about the
 so called "yellow sheet" which was before the par-
 ties when the Tripartite Agreement was negotiated,
 that, even at the risk of tediously prolonging this
 statement of facts, we deem it proper to give some
 account of that paper. It embodied the result of
 the investigation of accounts made by plaintiff and
 defendant, which led up to the Tripartite Agree-
 ment (Finding, A-61 at *fols.* 617, 618). Plaintiff
 criticised it on the ground that it did not deal with
 the expenditure of the proceeds of defendant's cap-

ital stock and bonds, but only with the charges and credits against its surplus. We maintain that, even if the parties had conducted their accounting upon an erroneous theory of law in leaving out of their consideration entirely the amount of capital expended upon the railroad, still, in the absence of mistake of fact, the accounting, followed by a complete consummation between the parties, would close that chapter of the relations between them. And for this proposition we shall cite authority,—*Jackson v. Volkening, infra*, at p. 189. But even a bare inspection of the “yellow sheet” (defendant’s exhibit 56, at p. 3183, vol. 8) shows that plaintiff’s criticism of it is quite incorrect. For that computation not only shows charges and credits to surplus, but also contains an inventory of all current assets (excluding property under the Lease) which defendant then had. It had borrowed \$300,000 on account of plaintiff’s default in the payment of rental (*fol.* 6797); and the “yellow sheet” shows the assets to be devoted to the repayment of that indebtedness, for the incurring of which plaintiff had been responsible. All the remaining current assets of defendant which it had on 15th August, 1894, were then listed, and their value summed up to \$315,909.65. In other words, if defendant had had no surplus whatever on that day, the utmost amount of the \$6,000,000, proceeds of stock and bonds, then remaining unexpended could have been only \$315,909.65. To the extent that there was a surplus, such sum of \$315,909.65, considered *prima facie* as unexpended capital, would be correspondingly reduced. It is clear, therefore, that the ascertainment of what was defendant’s surplus on 15th August, 1894, was strictly relevant to the inquiry whether on that day defendant had expended in construction the proceeds of all of its capital stock and bonds. The calculation of the

“yellow sheet” determined defendant’s surplus at \$624,250. This demonstrated that \$308,340.35 had been expended therefrom, since its assets on hand were deficient in that amount to make up the full surplus.

With the question of whether the marshalling of the items by which the amount of surplus was determined were or were not correct, we do not deal under this chapter of our argument. It is considered under the *Seventh Principal Question* (*infra*, pp. 279–336). Here we are concerned only to show that the accounting involved and adjusted the very issue which plaintiff has sought to litigate in this suit. Had the parties in 1894, a time of great and general business embarrassment and stress, desired to exhibit and preserve a record rather than to reach a result, they might have constructed the “yellow sheet” upon a basis illustrated by the table which we have submitted in this brief at pp. 11, 12, and which reaches the same results. But that would have involved a consideration at that time of all the multifarious items credited at *fols.* 7573–7593, 7600–7626, 7717–7737 and 8172–8586, of which the figures given in the Referee’s Findings and which we have used, are summaries. On the other hand, the surplus account involved a relatively small number of items. And, since the amount of the actual assets on hand was a physical and unmistakable fact (there is no contention, nor has there ever been, that the value of these assets was wrongly fixed), it was plain that, if the amount of surplus were determined upon, the remainder, if any, must be unexpended capital, or that if there were a deficiency in assets, there had been an expenditure made out of surplus. It is true that neither party then even broached the argument advanced here by plaintiff’s counsel that \$6,000,000 must be expended by defendant *after* 6th June, 1893, irrespective of what had been expended before, and irrespective of the fact that such obligation would entirely wipe out defendant’s

surplus, and in addition leave it with a large indebtedness. But, if the mere fact that a party to an accounting does not in the course of the accounting make a certain claim which, years afterward, it deems itself justified in setting up (whether good or bad, equitable or inequitable) could upset the resulting account stated, then the stating of an account in lieu of being a quieter of future litigation would become rather an instrument of deceit.

The claim made in this suit was in fact at no time made by plaintiff or any of its officers, but was solely and exclusively, as plaintiff's vice-president, Timothy S. Williams, testified, an invention of its counsel (*fol.* 4857-4859). That such a theory, not conceived until more than five years later, is now advanced, cannot, we submit, deprive the performance of the Tripartite Agreement, which involved the result of the examination of accounts as one of its terms, of the character of an accord and satisfaction.

The facts upon which plaintiff assails, and the Referee rejected, the binding force of the agreement are set forth in findings A-17 and A-18 at *fol.* 546-548, finding XLVII at *fol.* 703, 704 and findings L, LI, LII and LIII, at *fol.* 705-708, and are substantially these :

That, when on 17th August, 1894, the agreement was executed between defendant, plaintiff and the Traction Company—

“ the plaintiff was controlled by a Board of
 “ Directors and officers *substantially* all of
 “ whom were largely interested as stock-
 “ holders in the defendant * * * ” (finding
 XLVII at *fol.* 703) ;

And that, at that time

“ a *large majority* of the directors of the
 “ plaintiff were heavily interested as stock-
 “ holders of the defendant, and that of the
 “ nine directors who voted for the resolution

“ authorizing the execution of said tripartite agreement, *all but two* were so interested * * * ” (finding L at *fol.* 705, 706).

Such nine directors’ interests in shares, par value of shares and market value of shares of defendant and also of the Traction Company (which owned all the stock of the plaintiff) were as follows (finding A-17 at *fol.* 546, 547):

Name.	No. of shares owned in de- fendant.	Par of such shares, \$10	Market value thereof, \$17.50.	No. of shares in Traction Co.	Par thereof, \$100.	Market value thereof, \$14.75 to \$14.87½.
Lewis	13,500	\$135,000	\$236,250	2,900	\$299,000	\$44,473.75
Bogardus	66	660	1,155	10	1,000	148.75
Bliss	4,000	40,000	70,000	700	70,000	10,412.50
Campbell	4,560	45,600	79,800	3,200	320,000	47,600.00
Dutcher	133	1,330	2,327.50	270	27,000	4,016.25
Englis	none	.....	....	300	30,000	4,412.50
Young	none	.....	....	50	5,000	743.75
Marshall	7,200	72,000	126,000	2,250	225,000	33,468.75
Jenkins (none indi- vidually, 541 as executor)		5,410	9,467.50	300	30,000	4,462.50

There were then outstanding 1,200,000 shares of the defendant (finding 2, at *fol.* 291, 292 ; finding XXV at *fol.* 682) and 300,000 shares of the Traction Company (finding XII at *fol.* 666, 667 ; Finding A-17, *fol.* 546-548) ; and, in the absence of a finding or proof as to the number of Traction shares then outstanding, and assuming against the appellant that they were *all* outstanding, the fractional interests of such nine directors in the two companies respectively—that is to say, the fractions which such directors would get of any benefits to the two companies respectively—may, from the table just given, be certainly computed as follows :

Name.	Fractional interest in defendant.		Fractional interest in Traction Company.	
Lewis	$\frac{13,500}{1,200,000} = 01.125$	p. c.	$\frac{2,900}{300,000} = 00.96$	p. c.
Bogardus	$\frac{66}{1,200,000} = 00.0055$	"	$\frac{10}{300,000} = 00.003\frac{1}{3}$	"
Bliss	$\frac{4,000}{1,200,000} = 00.333\frac{1}{3}$	"	$\frac{700}{300,000} = 00.233\frac{1}{3}$	"
Campbell	$\frac{4,560}{1,200,000} = 00.38$	"	$\frac{3,200}{300,000} = 01.066\frac{2}{3}$	"
Dutcher	$\frac{133}{1,200,000} = 00.011$	"	$\frac{270}{300,000} = 00.09$	"
Englis	none none	"	$\frac{300}{300,000} = 00.10$	"
Young	none none	"	$\frac{50}{300,000} = 00.016\frac{2}{3}$	"
Marshall	$\frac{7200}{12,000,000} = 00.60$	"	$\frac{2,250}{300,000} = 00.75$	"
Jenkins	(none in- dividually = 00.045 $\frac{1}{12}$ 541 as Exr.)	"	$\frac{300}{300,000} = 00.10$	"

No testimony was given, no finding was made by the Referee—there was no allegation by plaintiff—that there was any fraud or fraudulent intention or anything whatever unfair on the part of any of these gentlemen. Plaintiff tried, and the Referee decided, the case on the theory and assumption that *any* interest of *any* of plaintiff's directors in defendant *ipso facto* disqualified him to vote on a matter between plaintiff and defendant.

Referee's conclusion XLVII at *fol.* 703,
704.

UPON THE LAW. [*Second Principal Question.*]

POINT I. [*Second Principal Question.*]

The Tripartite Agreement by its terms was an effective accord and satisfaction or binding adjustment of plaintiff's claim for further payment by defendant on cost of conversion.

We have thus amply, if not tediously, given the undisputed facts as to the discussions and examination of accounts which, according to the Referee's finding (45 at *fol.* 378), "led up to and "embraced the so-called tripartite agreement," in order that the intentional effectiveness of the release purporting to be accomplished by that agreement may, at the outset, be put beyond doubt. That is to say, the effectiveness of the text of the instrument on the assumption of its validity as against plaintiff—the latter being the important question to be discussed in the next point. We here recapitulate the case thus to be found by the Referee, or at any rate proved and undisputed, and not found otherwise by the Referee, that

- a. On 17th August, 1894, when the Tripartite Agreement was made defendant had, since 14th February, 1893, paid on cost of conversion as much as \$6,400,527.14 (finding A-36 at *fol.* 560, 561), and, on conversion actually done after that date, as much as \$6,107,108.85.
- b. On that day such payments of defendant for work done and materials furnished since 14th February, 1893, the date of the Lease, had been \$6,107,808.85 (findings A-2 at *fol.*

534; A-34 and A-35 at *fols.* 558, 559; XXXVIII at *fols.* 692-694 and A-5 at *fols.* 535, 536).

- c. Before 17th August, 1894, defendant had made all of its conversion expenditure.
- d. In such payments are amounts since, and in this action, disputed, being chiefly the conversion expenditure between 14th February and 6th June, 1893. And, from defendant's charges to its capital accounts approved in the Tripartite Agreement, plaintiff has since, and in this action, claimed that there should be deductions, chiefly the so-called "journal entries." But, whether correctly or not, the understanding and agreement on both sides in August, 1894, was that conversion expenditure between 14th February and 6th June, 1893, *should* be allowed to defendant, and that the "journal entries" *should not* be deducted from defendant's claim for charges to its capital account.
- e. Many and extensive examinations of accounts were had before the Tripartite Agreement was made. Whether really sufficient and sound or not is immaterial here. The investigations *were* made and the results of them *were* adopted.
- f. The officers and directors of the plaintiff had, most of them, been previously associated with the defendant company and had all been familiar with the affairs of both companies since their relations were established on 14th February, 1893. The interests in the two companies were in large part—indeed in very preponderant part, as it would seem probable—held by the same persons.

Nine-tenths of the stock of the Traction Company, which owned all the stock of plaintiff, had been put at the disposal of defendant's stockholders.

Findings 3, 4 and A-9 at *fol.* 296-298,
302, 538, 539;

Findings XII and XIII at *fol.* 666-668.

- g. There was no fraud or deception or collusion. Nor would any such finding be apt to be made with reference to all of a body of citizens of Brooklyn which included citizens so respected and conspicuous in its business affairs as David G. Leggett, Seymour L. Husted, Jr., W. Cary Sanger, Alonzo Slote, William A. White, Samuel W. Bowne, Edward Merritt, E. W. Bliss, Felix Campbell, William Marshall, Crowell Hadden, among others.
- h. Defendant then insisted that it had paid on conversion the full sums which could be requested from it under Arts. IV, V and XII of the Lease, and an excess of \$308,340.35, the amount by which it had impaired its surplus for that purpose; that under Arts. IV and V it was entitled to have its surplus kept intact, and that plaintiff was bound to repay that amount.
- i. Plaintiff was in embarrassment and sought pecuniary aid from defendant.

Such was the situation when the Tripartite Agreement was made. Plaintiff argued below, and to a successful result there—and it will argue here—that credits to a large amount were incorrectly allowed to defendant, that the accounts were very erroneously stated, and that defendant took advantage of plaintiff's pecuniary straits. But that, we again point out, is not the present question. We

may assume plaintiff's contention for this part of the present argument. Whether correctly or not—however wrongly—the parties *did* under such circumstances—and intentionally and most deliberately (there were many meetings, testimony of David G. Legget at *fols.* 5520, 5521, 5523, 5529; of Edward Merritt at *fol.* 5549, and of Joseph S. Auerbach at *fols.* 5670, 5671)—make the agreement under seal, which is to be interpreted in the light of the circumstances under which it was made (*Middleworth v. Ordway*, 191 N. Y., 404, 415, 416), but which, even by itself, spoke clearly.

The agreement has been already and carefully recapitulated, *supra*, pages 40–45. The full text is in the record at *fols.* 204–268. Among other things it recited or provided:

1. The ownership by the Traction Company, the third party to the agreement, of all plaintiff's capital stock (*fol.* 205).
2. Plaintiff's indebtedness to the defendant “ *in large sums of money for advances * * ** “ *in and about the conversion of said demised railroads * * ** ” (*fols.* 205, 206).
3. That plaintiff, *and also the Traction Company*, in order to complete conversion [this plaintiff was bound to do under Art. XXII of the Lease (*fols.* 94, 95)] were “ *about to issue and dispose of their joint and several promissory notes * * * the aggregate not to exceed three million dollars (\$3,000,000) * * ** ” (*fols.* 206, 207).
4. That plaintiff and the Traction Company should deliver to defendant their promissory note, payable 1st August, 1897, for \$308,340.35, “ *being a part of the indebtedness of the said ‘Heights Company’ to said Brooklyn Company * * ** ” (*fols.* 212, 213).

5. That plaintiff should pay all balances then owed by defendant for conversion, and which amounted to \$347,036.44, defendant loaning it the money wherewith to make such payments (*fol.* 216).
6. That defendant should lend plaintiff \$1,375,000 to be used for conversion purposes, of which the \$308,340.35 and \$347,036.44 were to be deemed part (*fols.* 210, 211, 215).

Upon this, it is submitted not to be open to debate that, whether rightly or wrongly, the two parties did then and thereby agree that the amount which, under the Lease, defendant could be called upon to pay for cost of conversion had been fully paid; that it had been overpaid by the sum of \$308,340.35, which sum was thereupon repaid, in satisfaction, by a note, provided for in the agreement in making which there joined with plaintiff a third party—the Traction Company.

Now whether this adjustment were recited in full detail and expressly, or the accord and satisfaction were technically recited as such, is immaterial. It is sufficient that the agreement and delivery of the note and plaintiff's acceptance from defendant of the other acts of the latter done under the agreement represented or implied the adjustment, accord and satisfaction. And, outside of the adjustment itself, there was the amplest consideration for it in the other provisions of the agreement.

Morehouse v. Second Nat. Bank (1885) 98 N.Y., 503: The General Term had applied the old rule that an accord without satisfaction was no bar to a suit upon the original cause of action. This holding was reversed, ANDREWS, *J.*, saying for the Court at page 509:

“ It is not, however, universally true that
“ a cause of action on a contract, or for a
“ tort, may not be extinguished by an agree-

“ment between the parties, although the
 “agreement which is the consideration for
 “the satisfaction is executory. If the sub-
 “sequent agreement is accepted in satisfac-
 “tion, and this appears *expressly or by*
 “*implication*, the original cause of action is
 “merged and extinguished. (*Kromer v.*
 “*Heim*, 75 N. Y., 574, and cases cited).”

Whitaker v. Eilenberg, 70 App. Div., 489, by
 HISCOCK, J., for the Court, at p. 494:

“We do not regard it as of any signifi-
 “cance in this case that the checks sent did
 “not upon themselves explicitly state that
 “they were in full payment. The letter or
 “account or both sent with each one clearly
 “showed that it was intended to be in full
 “settlement of the balance for the given
 “shipment in question. Plaintiff understood
 “this clearly enough.

“We think, therefore, that these checks
 “operated as a payment and satisfaction
 “and that plaintiff was not entitled to re-
 “cover the balance due in accordance with
 “the terms of the original contract, and
 “that error was committed in the trial and
 “submission of the case within the views
 “expressed in *Wisner v. Schropp* (34 App.
 “Div., 199); *Fuller v. Kemp* (138 N. Y.,
 “231); *Nassoiv v. Tomlinson* (148 *id.*, 326).”

In *Perin v. Cathcart*, 115 Iowa, 553, 557, the
 Court said of an accord and satisfaction :

“The agreement need not be express, but
 “may be implied from circumstances” (re-
 “ferring to *Fuller v. Kemp*, 138 N. Y., 231
 and other cases).

In *Coon v. Knap*, 8 N. Y., 402, a certain writing
 was construed and held to be a contract, not a mere
 receipt, TAGGART, J., saying at p. 408 :

“The receipt in this case although not ex-
 “pressed to be upon a compromise, clearly

“ was so upon its face. It is, therefore, in
“ the nature of a contract, and is so far
“ within the general rule that it is not liable
“ to be varied by parol evidence.”

In *1 Cyc.*, 338, it is said :

“ In some decisions it has been said that
“ an express agreement that the promise
“ shall operate as satisfaction is necessary.
“ In others it has been said that it will be
“ sufficient if the intention of the creditor to
“ accept the promise in satisfaction appears
“ *either expressly or by implication, and*
“ *this is probably a more correct statement*
“ *of the rule.*”

In *Hall v. Smith*, 15 Iowa, 584, 588-9, the
Court, in applying the foregoing doctrine, said :

“ Whether * * * the accord or (new)
“ agreement was accepted as satisfaction,
“ depends upon the circumstances of each
“ case; and in determining its tenor and
“ effect, we must, from the circumstances,
“ endeavor to ascertain the intention of the
“ parties. For, while some authors and
“ some of the cases speak of the unexecuted
“ promise being satisfaction in those cases
“ only where it is made so by express agree-
“ ment, we suppose that ordinarily no rule
“ is violated in holding that it is sufficient
“ if this intention or purpose is evidenced by
“ any unequivocal act, or in any clear man-
“ ner. It was said in examining a some-
“ what similar proposition in *Levi vs. Kar-*
“ *rick*, 13 Iowa, 344: ‘ The question is one
“ ‘ of evidence or contract, and whether
“ ‘ * * * established by necessary impli-
“ ‘ cation or from express stipulation, the
“ ‘ rule is the same.’ ”

Nor was it necessary to show any prolonged or
actual contest of views between the parties.

Goodrich v. Sanderson, 35 App. Div., 546. Action for rent, where part had been previously paid, remainder having been deducted because premises destroyed. Later Court decision indicated that under lease such deduction could not be made. *Held*, that acceptance of less amount, deductions being fixed after discussion, was accord and satisfaction. This Court adopting the opinion of Referee MAN, said at p. 551 :

“ I am, however, satisfied that in negoti-
 “ ating for a settlement, the defendants
 “ pressed their claim in good faith, and that
 “ it was conceded as a valid claim by the
 “ plaintiff in equally good faith, and the
 “ amount adjudged by negotiation, the re-
 “ sult of which both parties accepted. * * *
 “ (p. 552). Among other things, stress was
 “ laid upon an expression which occurs in
 “ some of the cases on the topic, that it is a
 “ requisite to a valid accord and satisfaction
 “ that there should have been a disputed
 “ claim.

“ It does not seem to me that it would add
 “ anything to the strength of the plaintiff's
 “ case if I were to hold that he did not dis-
 “ pute the defendant's claim to an offset.
 “ If so, it must be on account of some purely
 “ technical rule, because to the ordinary
 “ mind an undisputed claim would naturally
 “ appear to furnish at least as good a con-
 “ sideration for a settlement as the same
 “ claim if it were disputed. I do not think
 “ that the use of the word ‘ disputed ’ in the
 “ cases cited by plaintiff, means that one
 “ who omits to dispute a claim may there-
 “ after insist that a settlement of it was in-
 “ valid on account of that omission. * * *

“ (p. 553) I think that this letter shows that
 “ there had been matter requiring adjustment,
 “ and I can see no distinction between such
 “ matter and matter in dispute. * * *

“ Nor can I agree with the contention
 “ that there is no accord unless there is com-

“ promise. I do not find any case so holding.
“ It seems to me that the case of *Nassoiiy v.*
“ *Tomlinson* (148 N. Y., 326) is inconsistent
“ with such a proposition.”

Jackson v. Volkening, 81 App. Div., 36 (aff'd
178 N. Y., 562), by LAUGHLIN, J., at p. 44 :

“ In the case at bar it is unnecessary to
“ determine whether the defendant's claim
“ for a rebate was valid and enforceable.
“ The court will not inquire into the merits ;
“ it is sufficient if there was any plausible
“ ground for a *bona fide* claim, and it was
“ made in good faith, and it is immaterial
“ whether the dispute arose over a question
“ of fact or of law ” (citing authorities).

POINT II. [*Second Principal Question.*]

Plaintiff's delivery of the notes of the Traction Company, a third party, established the accord and satisfaction, as did the consideration provided by defendant in other parts of the agreement.

In the present case there is the further and conclusive fact (finding 62 at *fol.* 406) that the note for \$308,340.35 given in satisfaction bore the name of a third party, the Traction Company, which of itself established the accord and satisfaction. And further that, outside of the adjustment itself, the Tripartite Agreement, in other provisions of it, contained ample consideration for the adjustment.

Boyd v. Hitchcock (1822), 20 Johns., 76. Head-note :

“ Where a debtor gives his note, indorsed
“ by a third person, as further security, for
“ a part of the debt, which is accepted by

“ the creditor in full satisfaction of all de-
 “ mands, it is a valid discharge of the whole
 “ debt, and it may be pleaded in bar, as an
 “ accord and satisfaction.”

Allison v. Abendroth, 108 N. Y., 470, by
 ANDREWS, J., at p. 472 :

“ But it is held that, where there is an
 “ independent consideration, or the creditor
 “ receives any benefit or is put in a better
 “ position, or one from which there may be
 “ legal possibility of benefit to which he was
 “ not entitled except for the agreement,
 “ then the agreement is not *nudum pactum*
 “ and the doctrine of the common law
 “ to which we have adverted has no
 “ application. Upon this distinction the
 “ cases rest which hold that the accept-
 “ ance by the creditor in discharge of the
 “ debt of a different thing from that con-
 “ tracted to be paid, although of much less
 “ pecuniary value or amount, is a good satis-
 “ faction, as for example a negotiable in-
 “ strument binding the debtor and a third
 “ person for a smaller sum. (Curlew v.
 “ Clark, 3 Exch., 375).”

See also, in support of this principle :

Jaffray v. Davis, 124 N. Y., 164.

LePage v. McCrea, 1 Wend., 164, 172.

Booth v. Smith, 3 Wend., 66.

Kellogg v. Richards, 14 Wend., 116.

Frisbie v. Larned, 21 Wend., 450.

Singleton v. Thomas, 73 Ala., 205, 208.

Argall v. Cook, 43 Conn., 160.

Hanson v. Cowan, 7 T. B. Mon. (Ky.),
 574.

Jenness v. Lane, 26 Me., 475.

Varney v. Conery, 77 Me., 527.

Mason v. Campbell, 27 Minn., 54.

Bowker v. Harris, 30 Vt., 424.

POINT III. [*Second Principal Question.*]

The Tripartite Agreement having been authorized, not only by plaintiff's directors but by the Traction Company, owner of all the shares of plaintiff's stock, is binding against plaintiff, even if the directors had adverse interest by reason of their holdings of stock in defendant.

A. Assuming for the moment that the agreement was voidable by reason of the preponderance of interest which plaintiff's directors, when they authorized the agreement, had in defendant's stock over what they had in the stock of the Traction Company—the owner of all the shares of plaintiff—the agreement was none the less at law entirely valid and efficacious and would remain so until successfully impeached in equity.

10 Cyc., 818: "The mere fact that some, a majority or all of the directors or contracting officers of two corporations are common to both does not make a contract between the two corporations absolutely void or incapable of ratification. Such contracts are valid at law, the reason being that in theory of law the contracting parties are the artificial persons and not the directors."

Barr v. N. Y., L. E. & W. R. R. Co. (1891), 125 N. Y., 263, by GRAY, J., at p. 277:

"It was a good enough contract at law, but because of the immorality of directors, common to both contracting companies, combining to procure the execution of a contract in which they were personally interested, a court of equity could interfere and set it aside at the instance of the injured party. The right, however, to invoke the equitable interference of the courts depends upon the circumstances of

“ the case, and aid will be denied where, in
 “ a case like the present one, the contract has
 “ been executed, unless the party claiming
 “ to be injured acts diligently, in asserting
 “ a right to rescind, and honestly, by yield-
 “ ing up what came to it and continues to be
 “ held and enjoyed under the contract.”

And at page 279 :

“ It is quite a misapprehension of the
 “ matter to treat the contract of lease as in
 “ itself illegal and, therefore, incapable of
 “ enforcement in the courts. The contract
 “ was not illegal in itself, but, on the con-
 “ trary, was one the companies could enter
 “ into, through the action of their directors,
 “ with perfect propriety. What happened,
 “ as the result of the combination of persons
 “ and of directors common to each contract-
 “ ing company, was that that fact infected
 “ the agreement, and impaired its binding
 “ force as an obligation. It did not annul
 “ or destroy it, but subjected it to the con-
 “ demnation of the law. *A court of equity*
 “ *could give relief against it*, but whether
 “ it would exert its power would necessarily
 “ depend upon the circumstances of the case,
 “ and the conduct of the parties.”

*The United States Rolling Stock Co. v. The
 Atlantic and Great Western Railroad Company,*
 34 Ohio State, 450, by BOYNTON, J., at pp. 464, 465:

“ But a contract between two corporations
 “ having common directors, made by their
 “ respective boards, or between a corpora-
 “ tion and an individual director or a firm
 “ of which he is a member, is, at common
 “ law, perfectly valid. * * *

“ These citations sufficiently show that, in
 “ England, a contract between a corporation
 “ and one of its directors would, in the ab-
 “ sence of a statute affecting its validity, be
 “ upheld and enforced in her common-law
 “ tribunals. That the same rule prevails in

“ this country is well established. See
“ *Ashurst's Appeal*, 60 Penn. St., 290; *Stark*
“ *Bank v. U. S. Pottery Co.*, 34 Vt., 144.”

Little Rock & Ft. Smith Ry. Co. v. Page, 35
Ark., 304, by EAKIN, J., at p. 314 :

“ The directors all stood in the relation of
“ trustees to the stockholders and creditors
“ of the road, and would not be allowed, in
“ chancery, to deal with it at all for their
“ individual benefit. But such contracts
“ are not void at law. *The interposition of*
“ *a court of equity to set them aside is es-*
“ *sential. Until that is done they remain*
“ *valid, and cannot be collaterally attacked,*
“ *in a suit at law, by strangers or by par-*
“ *ties.* A corporation is a person distinct
“ from the individuality of its directors.
“ There are here two parties competent to
“ make a contract—Page and the corpora-
“ tion—and there is no rule of law to pro-
“ hibit them from doing so. The rule be-
“ longs to equity, which derives its juris-
“ diction to interfere from the fact that courts
“ of law do not take cognizance of these
“ trusts, and only moves at the instigation
“ of those who have been or may have been
“ injured (*Story's Equity*, 321–2–3). Until
“ so cancelled, such contracts are good.”

B. *The Traction Company, the owner of all the shares of plaintiff's stock, having, by joining in it as a party, approved of the Tripartite Agreement, the agreement is not voidable by plaintiff, even if otherwise plaintiff could avoid it by reason of adverse interest of directors.*

Little v. Garabrant, 90 Hun., 404 (affirmed in 152 N. Y., 661, on opinion below), by PARKER, J., at p. 407:

“ The question that we are considering as-
“ sumes that the rights of creditors and of
“ third parties do not intervene. The pay-

“ments in such a situation, although il-
 “legal, if made without the authority of
 “the stockholders, could be validated by the
 “assent of all of the stockholders. And
 “this rule proceeds upon the theory that
 “the stockholders are the equitable owners
 “of the corporate property, and if the
 “officers or trustees do an unauthorized act,
 “incur an indebtedness or make a loan of
 “its money or credit outside of the ordinary
 “course of its business, still, if all the stock-
 “holders unite, they may subsequently
 “ratify the acts done and thus validate that
 “which was originally unauthorized and il-
 “legal. * * * (p. 409) The conclusion
 “necessarily follows that, if the corporation
 “were in existence and solvent, it could not
 “maintain this action. The receiver, it is
 “true, represents not only the corporation
 “but the creditors and stockholders as well,
 “but, as trustee for the corporation and
 “stockholders, he stands in no better posi-
 “tion to enforce this claim than did they.”

Remington v. Caswell, 126 App. Div., 142 by
 SPRING, J., at p. 149 :

“I assume if Edward Remington had been
 “the sole stockholder of the plaintiff at the
 “time of the transaction with Caswell he
 “could not thereafter use the corporate
 “name in an action for its disaffirmance.
 “There is no sanctity hedged about a corpo-
 “ration. If it resorts to a court of equity
 “it must appear that justice demands the
 “relief which it seeks. The stockholders of
 “a corporation may ratify and affirm the
 “unauthorized acts of its directors and of-
 “ficers, and when they do so their adoption
 “of these acts is effective to bind the corpo-
 “ration, unless they offend against the
 “public or the rights of creditors are im-
 “paired.”

Salomon v. Salomon, L. R. 1897, A. C. 22, by
LORD HALSBURY, L. C., at p. 33 :

“ VAUGHAN WILLIAMS, J., appears to me
“ to have disposed of the argument that the
“ company (which for this purpose he as-
“ sumed to be a legal entity) was defrauded
“ into the purchase of Aaron Salomon's
“ business because, assuming that the price
“ paid for the business was an exorbitant
“ one, as to which I am myself not satisfied,
“ but assuming that it was, the learned
“ judge most cogently observes that when
“ all the shareholders are perfectly cognizant
“ of the conditions under which the company
“ is formed and the conditions of the pur-
“ chase, it is impossible to contend that the
“ company is being defrauded.”

And by Lord DAVEY in same case, at p. 57:

“ I think it an inevitable inference from
“ the circumstances of the case that every
“ member of the company assented to the
“ purchase, and the company is bound in a
“ matter *intra vires* by the unanimous
“ agreement of its members. In fact, it is
“ impossible to say who was defrauded.”

Continental Ins. Co. v. N. Y. & Harlem R. R.
Co., 187 N. Y., 225, by CULLEN, C. J., at p. 238,
referring to a lease made by common directors :

“ Assuming that the fact that the ma-
“ jority of the directors of the Harlem were
“ also directors of the Central rendered the
“ agreement made by the two boards for an
“ apportionment of the interest reduction
“ between the two companies voidable at
“ the election of the Harlem stockholders,
“ as doubtless was the case, nevertheless
“ the agreement was not absolutely void,
“ but could be ratified by the action of such
“ stockholders, in which case it would be-
“ come binding upon the company.”

Marbury v. Stone, 17 App. Div., 352, affirmed on opinion there, 160 N. Y., 701: Contracts were made whereby property of a corporation was transferred to one of its directors, who was also a stockholder. This was done because another stockholder, who had been manager of the corporation, had mismanaged its affairs, so that a heavy loss was threatened to the other stockholders, who had provided the money to conduct its business. At the time of these transfers all of the stockholders of record had consented thereto. It was held that, since all the stockholders at the time had agreed to these transfers, a subsequent transferee of the stock could not attack them.

Stewart v. St. Louis, &c., R. Co., 41 Fed., 736:

“T. and A. having,” as set forth in the head note, “for a small sum, purchased a road-bed, the construction of which cost only \$2,000, caused a railroad company to be organized, and, with others, became directors thereof, and while in this relation contracted with the directors to sell the road-bed to the Company for \$200,000 cash or bonds, and \$3,600,000 of the capital stock.” FOSTER, *J.*, for the Court said, at p. 738:

“All parties—directors and stockholders—assented to it; and, surely, subsequent purchasers of stock, or the corporation itself, cannot now object to it. 1 Mor. Priv. Corp., 290.”

Bostwick v. Young, 118 App. Div., 490 (affirmed 194 N. Y., 516), by SEWELL, *J.*, at p. 496:

“If we assume that the contract was voidable, because of a scheme to obtain the stock without paying for it; that there was fraud and collusion in promoting the company, in evading a direct contract and in causing the stock and bonds to be issued and delivered, neither the corporation nor its receiver is in position to complain or

“ to assert any right against the defendants,
“ for it clearly appears that it was all done
“ with the consent and co-operation of all
“ the officers, directors and stockholders,
“ and that no other persons were concerned
“ or interested in the corporation (*Little v.*
“ *Garabrant*, 90 Hun, 404; *Barr v. N. Y.*,
“ *L. E. & W. R. R. Co.*, 125 N. Y., 263;
“ *Seymour v. Spring Forest Cem. Assn.*,
“ 144 *id.*, 341).”

Parsons v. Hayes, 14 Abb. N. C., 419 : In this case the General Term of the Superior Court of New York held that

“ inasmuch as the acts complained of
“ were performed with the consent and par-
“ ticipation of C, who was for the time be-
“ ing, the holder of all the stock in the cor-
“ poration, the latter had no cause of action
“ or right to damages, and that the plaintiff,
“ suing on behalf of the corporation, was
“ not entitled to relief.”

SEDGWICK, *Ch. J.*, said at p. 432 :

“ On the claims for the plaintiff, the thing
“ possessed is the right of the corporation to
“ have an action against its trustees for
“ damages for their acts, which it is claimed
“ were wrongful to the corporation. This
“ right, if it existed, was held by the same
“ tenure and for the same purposes that
“ other property would be held. The cor-
“ poration would have a bare title to it for
“ the beneficial use of shareholders. It
“ seems to be evident, that the corporation
“ could not claim as damage to its interest
“ what would be damage to the beneficial
“ interest, when the owners of the latter had
“ consented to the so-called injury.”

C. *That the corporation is bound by the act of its shareholders, even where due corporate formalities were not observed, is shown by many other authorities of which we cite only a few.*

Elyea v. Lehigh Salt Mining Co., 169 N. Y., 29,
by GRAY, J., at p. 33 :

“ Certainly, what the stockholders might
“ have done by the requisite vote, at a
“ formal meeting, they might do by agree-
“ ment between themselves, to which the
“ assent of every one was obtained. *They*
“ *were the corporation and the proprietors*
“ *of the corporate interests, and, acting col-*
“ *lectively, no action of a formal nature*
“ *could be more binding in disposing of cor-*
“ *porate properties.* It made the company
“ chargeable with the agent’s act and cured
“ any defect in his authority in performing
“ the act.”

Stratton’s Independence v. Dines, 126 Fed., 968,
by RINER, J., at p. 974 :

“ Stratton and these seven nominal share-
“ holders were at the time of this sale the
“ only members of the company. The com-
“ pany owned no other property except these
“ mining claims, and I am unable to see
“ how the company can complain of an act
“ *of which all the members of the company*
“ *were cognizant and which they approved*
“ *and confirmed.*”

Indeed, it is merely as representative of the share-
holders that the corporation can itself maintain an
action for such equitable relief.

Arkansas River, etc., Co. v. Farmers’ Loan, &c.,
Co., 13 Colorado, 587, by PATTERSON, C., at p. 598:

“ The parties participating in these trans-
“ actions were the entire constituency of the
“ corporation. There was no dissenting
“ voice. The corporation itself, therefore,
“ was not only involved in, but must be
“ deemed to have consented to, all these
“ transactions. It is true that, for some
“ purposes, a body corporate is sometimes re-
“ garded as a legal entity, or a fictitious
“ person having a distinct existence. This

“fiction is not recognized in equity. The
“reason is clear. Without organization
“and members, without officers and stock-
“holders, a corporation is but a naked body.
“It may be authorized to exercise corporate
“franchises, but is without means or instru-
“mentalities for such exercise. It is clear,
“therefore, that a body corporate cannot
“maintain a suit for equitable relief, ex-
“cept as the representative of the stock-
“holders.”

D. *The right to avoid the Tripartite Agreement because plaintiff's directors had had an interest adverse to plaintiff was, obviously, in the plaintiff company itself, or of some of its stockholders suing in its behalf, and not anywhere else; and, since plaintiff could not impeach it, no one else could.*

No other doctrine was ever heard of, and authorities are hardly needed. The doctrine is a strict corollary to the rule that the agreement was valid at law and could be avoided only in equity.

Ashurst's Appeal, 60 Penn St., 290, by STRONG, J., at p. 315 :

“The utmost the complainant's claim is,
“that it was voidable. Certainly nothing
“more can be claimed. Let it be, then,
“that it might have been set aside at the
“instance of the corporation, or even of a
“stockholder, as against the policy of the
“law and constructively fraudulent. Still
“it was valid in equity as well as in law,
“unless one or the other chose to avoid it.”

Vide other authorities supra.

The proposition that the right to avoid is in the corporation is emphasized by the rule that the stockholders' right to exercise the power is in the majority, not in the minority, of them. The only limitation is in the case of deceit, concealment or other

actual fraud, of which there is in the present case neither any finding by the Referee nor any proof whatsoever.

Continental Ins. Co. v. N. Y. & Harlem Co., 187 N. Y., 225, by CULLEN, C. J., at p. 238:

“ *The right, however, to avoid a contract*
 “ *made by common directors is in the cor-*
 “ *poration, not in minority stockholders*
 “ *(Burden vs Burden, 159 N. Y., 287). In*
 “ *that case, speaking of minority stock-*
 “ *holders, Judge BARTLETT said: ‘The*
 “ *plaintiff is in the position of all minority*
 “ *stockholders, who cannot interfere with*
 “ *the management of the corporation so*
 “ *long as the trustees are acting honestly*
 “ *and within their discretionary powers.’*
 “ *As already stated, it was so ratified by*
 “ *an overwhelming majority, and the ratifi-*
 “ *cation is conclusive upon the parties unless*
 “ *the action of the majority of the stock-*
 “ *holders was dictated by fraud or was pro-*
 “ *cured by concealment and in ignorance of*
 “ *the true state of the facts.’* ”

Hart v. Ogdensburg Co., 89 Hun, 316, by PUTNAM, P. J., at p. 321:

“ *It is held that a contract made by a*
 “ *director of a corporation with it is void-*
 “ *able by the corporation and it has also*
 “ *been decided that the same rule applies to*
 “ *a contract by the directors of a corpora-*
 “ *tion with another corporation of which*
 “ *they are also directors. * * * VAN*
 “ *BRUNT, J., remarks in Metropolitan El.*
 “ *R. R. Co. v. Manhattan El. R. R. Co.*
 “ *(11 Daly, 373, 502, 503), referring to the*
 “ *doctrine laid down in Wallace v. Long*
 “ *Island R. R. Co. (12 Hun., 460): ‘The*
 “ *principle is here recognized that the ma-*
 “ *jority of the stockholders may ratify a*
 “ *lease made by the directors, and that a*
 “ *minority cannot disaffirm. That, there-*
 “ *fore, it must be the majority of the*

“ ‘shareholders acting through the corpora-
 “ ‘tion who repudiate, and no shareholder
 “ ‘has the power to exercise that right
 “ ‘against the will of the majority.’ I con-
 “ cur in the views thus stated (see, also,
 “ *Gamble v. Q. C. W. Co.*, 123 N. Y.,
 “ 92-98).”

Wallace v. Long Island Co., 12 Hun, 460, by
 GILBERT, J., at p. 463 :

“ If the corporation, acting with the ap-
 “ proval of the holders of the major part of
 “ the stock thereof, prefer to abide by the
 “ leases, they cannot be avoided on the com-
 “ plaint of a minority of the stockholders
 “ against the will of the corporate body so
 “ manifested, and in absence of evidence
 “ that the holders of the major part of the
 “ stock disapprove the acts of the directors,
 “ their approval thereof must be presumed.”

E. *So the fact, if it existed, that the directors of the Traction Company were the same persons who were plaintiff's directors and had an interest favorable to defendant and adverse to the Traction Company as well as to plaintiff, clearly gives no right to plaintiff, but a right only to the Traction Company or its stockholders suing in its behalf, which would have to be asserted by the Traction Company itself suing directly or by representative stockholders.*

Vide authorities supra.

Not only is neither the Traction Company nor any one of its stockholders a party to this action; but there is no finding, allegation, proof or even suggestion that the Traction Company or any of its stockholders—whether a majority or a minority—or a single one of them, has objected to the tripartite agreement, or wishes it avoided. *Non constat* but all of such stockholders have assented.

And if, by any possibility any such question of avoidance by any of them could be raised in this suit, the burden of proof would of course be upon plaintiff.

POINT IV. [*Second Principal Question.*]

The plaintiff's directors who authorized the Tripartite Agreement had no such adverse interest as to render their action voidable.

The doctrine that any stock holding interest whatever on the part of a director in any other company would render voidable his acts as director, would be intolerable if applied, as plaintiff would have it. There must be proved a substantial inducement to the director to act against this fiduciary duty.

1 *Morawetz Private Corporations*, sect. 521 :
 “A mere nominal or a naked legal interest in the sub-
 “ject matter of a transaction would not disqualify
 “an agent from representing his principal in the
 “transaction, if there is no temptation to the agent
 “to obtain an advantage at the expense of the
 “principal ; there must be a real and substantial
 “inducement to the agent to sacrifice the interest
 “of the principal. Thus, a director ought not to
 “be held disqualified from representing the corpo-
 “ration in a transaction with another company
 “merely because he is a shareholder in the latter,
 “if the amount of his stock is so small that his in-
 “terest in the transaction would be practically
 “insignificant.”

Machen, Modern Law of Corporations, vol. 2,
 sec. 1581 : “The equitable doctrine that contracts
 “in which directors have adverse private interests
 “are voidable applies in strict logic not merely to
 “contracts between the company and its directors,
 “or between a company and a firm in which di-

“rectors are partners, but also to all contracts in which directors have any interest, direct or indirect, adverse to that of the corporation. For example, it would apply to contracts with another company in which the directors or some of them are shareholders; and such perhaps is the English rule. Yet it would be almost intolerable in practice that a board of directors could have no dealings with another corporation in which one of them was a member; and it has been held in New Jersey that the mere fact that directors of one company own shares in a corporation which owned a controlling interest in a rival corporation of the first company will not affect contracts between the first company and the rival company with any legal infirmity. It is scarcely necessary to mention that if directors enter into a contract, not *bona fide* for the good of the company, but in order to secure some private advantage to themselves as members of another corporation, the contract is everywhere voidable: it is obviously immaterial that the expected advantage is to accrue to them indirectly, as members of another company, and not directly.”

Now, in the present case there is no finding or proof or allegation or, outside of counsel's argument, even a suggestion that what plaintiff's directors did was “not *bona fide*” or “in order to secure some private advantage to themselves” or otherwise fraudulent.

Scofield v. State National Bank, 97 Fed., 282, by SANBORN, C. J., at p. 290 :

“Nor was the relation of McNeil to these banks and to this transaction such that his vote for the August agreement as a member of the board of directors of the Union Bank can be held to vitiate that contract. * * * There is no averment in the complaint that there was any fraud or imposition practiced upon the Union Bank. McNeil's adverse interest, if he

“ had any, was too remote, contingent, and
 “ uncertain to warrant any court, in the
 “ absence of fraud, in abrogating or ignor-
 “ ing the deliberate agreement of these cor-
 “ porations, made many years ago, and com-
 “ pletely performed, without objection, long
 “ before any action was brought which
 “ challenged it.”

Hill v. Gould, 129 Mo., 106, by BURGESS, J., at
 p. 116 :

“ In the absence of fraud or misconduct,
 “ from which they expected to, or did in
 “ fact, derive some unfair advantage, a
 “ court of equity will not interfere and
 “ wrest from their control the management
 “ of the company.”

We have already shown (*supra*, p. 179) what
 was the real relation between the interests of de-
 fendant's directors who authorized the agreement
 in the Traction Company on the one side and their
 interests in defendant on the other. We here state
 the result. There were nine such directors; and
 their fractional interests in the defendant and the
 Traction Company respectively were as follows :

Name.	Fractional interest in Defendant.		Fractional interest in Traction Company.	
Lewis	01.125	per cent.	00.96	per cent.
Bogardus	00.0055	“ “	00.003 1/3	“ “
Bliss	00.333 1/3	“ “	00.233 1/3	“ “
Campbell	00.38	“ “	01.066 2/3	“ “
Dutcher	00.011	“ “	00.09	“ “
Englis	none		00.10	“ “
Young	none		00.016	“ “
Marshall	00.60	“ “	00.75	“ “
Jenkins	00.045 1/12	“ “	00.10	“ “

In the case of Messrs. Campbell, Dutcher, Englis,
 Young, William Marshall and John G. Jenkins, the
 fractional interests owned in the Traction Company
 were greater than the like interests owned in the de-
 fendant; and the motive, if any, to be inferred
 from such interests was a motive to favor the

plaintiff rather than the defendant. That was the situation, in the case of a majority of the nine assenting directors. Of the remaining three Mr. Lewis had an interest of 0.96 per cent. in the Traction Company, as against 1.125 per cent. in the defendant; Mr. Bogardus an interest of $0.003\frac{1}{3}$ in the Traction Company against 0.0055 in the defendant, and Mr. Bliss an interest of $0.233\frac{1}{3}$ in the Traction Company, as against $0.333\frac{1}{3}$ per cent. in defendant.

Now in the absence of any allegation or proof of fraud, can it be said that, as mere matter of a rigorous rule in equity, such relatively slight preponderance of interest on the part of three out of nine directors who voted for the Tripartite Agreement rendered their action voidable? We submit, upon the authorities above cited, that that is not the law.

The Referee himself ruled (as was held in *Beveridge v. N. Y. El. R. Co.*, 112 N. Y., 1, 28, and *Dunphy v. Travelers' Newspaper Assn.*, 146 Mass., 495) that

“ the presumption is that directors of corporations do their duty and act honestly
“ in the absence of evidence to the contrary.”

Defendant's proposed Conclusion of Law,
No. 26, at fol. 649.

POINT V. [*Second Principal Question.*]

Neither the Traction Company nor any successor or stockholder of it is a party to this suit. Nor could the Tripartite Agreement be avoided except in a proceeding to which it should be a party.

The doctrine that a bargain between three parties will not be undone by a court unless upon an opportunity to all of them to be heard would seem to need no argument. The question has, however, been argued and decided.

Metropolitan Co. v. Manhattan Co., 11 Daly, 373, by VAN BRUNT, J., at p. 436 :

“The New York company had a right to
 “be heard on the question. *One party can-*
 “*not be released by legal proceedings from*
 “*a tripartite agreement, in an action*
 “*against one other party.* All the parties
 “must be brought before the court, as all
 “have a right to be heard upon the question
 “as to whether the agreement which is
 “mutual shall be broken up. Therefore, the
 “New York company is a necessary party to
 “any action seeking to avoid the October
 “agreements, that company being one of
 “the parties to them. If an action was
 “brought upon the lease of May 20th, 1879,
 “the New York company could not have
 “been brought in as has been done in this
 “case.”

Osterhoudt v. Board of Supervisors, 98 N. Y., 239, by ANDREWS, J., at p. 244 :

“The other branch of the rule would be
 “illustrated by an equitable action brought
 “for the cancellation of a mortgage, exe-
 “cuted to two persons as mortgagees, in
 “which only one of the mortgagees was
 “made defendant. The court could not
 “proceed to a decree for the plaintiff with-
 “out the presence of the other mortgagee.
 “The distinction is between those who are
 “necessary parties and those who are proper
 “parties merely. *When persons who are*
 “*necessary parties are not joined, the court*
 “*will not proceed until they are brought in.*”

Plaintiff cannot, of course, argue that the objection to the absence of the Traction Company from this suit was not pleaded by defendant. Plaintiff's complaint neither mentioned the Tripartite Agreement nor asked any relief from it. Plaintiff's attack upon it was first made years after this suit was begun.

Vide discussion, *infra*, pp. 213, 214,
 under *Third Principal Question*.

POINT VI. [*Second Principal Question.*]

The Tripartite Agreement was irrevocably established against plaintiff by its long acquiescence and laches during which it accepted the benefits of the agreement.

This rule needs little authority to sustain it. The doctrine is extensively illustrated in the books and by several of the authorities already quoted and is fundamental.

Kelley v. Newburyport Co., 141 Mass., 496, by C. ALLEN, J., at p. 499 :

“ As a general rule, a contract between a corporation and its directors is not absolutely void, but voidable at the election of the corporation. Such a contract does not necessarily require any independent and substantive act of ratification, but it may become finally established as a valid contract by acquiescence. The right to avoid it may be waived. *Union Pacific Railroad v. Credit Mobilier*, 135 Mass., 367, 376; *Twin-Lick Oil Co. v. Marbury*, 91 U. S., 587; *Hotel Co. v. Wade*, 97 U. S., 13; *Ashurst's Appeal*, 60 Penn. St., 290.”

Nor is actual knowledge necessary to establish the laches. If plaintiff or its stockholders ought to have known the situation, laches would exist.

Foster v. Mansfield Co., 146 U. S., 88, by BROWN, J., at p. 99:

“ The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed

“ himself of all the facts. Especially is this
 “ the case where the party complaining is a
 “ resident of the neighborhood in which the
 “ fraud is alleged to have taken place, and
 “ the subject of such fraud is a railroad
 “ with whose ownership and management
 “ the public, and certainly the stockhold-
 “ ers, may be presumed to have some
 “ familiarity.”

Ashurst's Appeal, 60 Pa. St., 290, by STRONG, J.
 (afterwards Mr. Justice STRONG of the Federal
 Supreme Court), at p. 315 :

“ Acquiescence is presumed from delay.
 “ Lapse of time, indeed, is no bar to the
 “ assertion of a direct trust, but not so when
 “ the trust is constructive. If a trustee to
 “ sell become the purchaser his purchase is
 “ generally voidable, but the *cestui que trust*
 “ must move to avoid it within a reasonable
 “ time: *Campbell v. Walker*, 5 Ves., 678 ;
 “ *Hawley v. Kramer*, 4 Cowen, 718; *Prevost*
 “ *v. Gratz*, 1 Peters' C. C. Rep., 368; *Clegg*
 “ *v. Edmundson*, 3 Jur. N. S., 299. This last
 “ case is instructive in many particulars. In
 “ *Beckford et al. v. Wade*, 17 Ves., 87, Sir
 “ WILLIAM GRANT said : ‘ It is certainly
 “ ‘ true that no time bars a direct trust
 “ ‘ as between *cestui que trust* and trus-
 “ ‘ tee ; but if it is meant to be asserted that
 “ ‘ a court of equity allows a man to make
 “ ‘ out a constructive trust, at any distance
 “ ‘ of time after the facts and circumstances
 “ ‘ happened out of which it arises, I am not
 “ ‘ aware that there is any ground for a
 “ ‘ doctrine so fatal to the security of prop-
 “ ‘ erty as that would be ; so far from it,
 “ ‘ that not only in circumstances where the
 “ ‘ length of time would render it extremely
 “ ‘ difficult to ascertain the true state of the
 “ ‘ fact, but where the true state of the fact
 “ ‘ is easily ascertained, and where it is per-
 “ ‘ fectly clear that relief would originally
 “ ‘ have been given upon the ground of
 “ ‘ constructive trust, it is refused to the
 “ ‘ party who after long acquiescence

“ ‘comes into a court to seek that relief.
“ ‘In proof of this it is not necessary
“ ‘to produce any other case than that of
“ ‘*Bonny vs. Ridgard* (cited in 4 Brown’s Ch.
“ ‘Cas., 138), in which Lord KENYON, when
“ ‘Master of the Rolls, on the sole ground of
“ ‘length of time, reversed a decree by which
“ ‘Sir THOMAS SEWELL had granted relief
“ ‘against a fraudulent purchase, and had
“ ‘declared the purchaser to be a trustee for
“ ‘the plaintiffs in the cause, Lord KENYON
“ ‘agreeing perfectly that the purchase was
“ ‘originally fraudulent, and that the de-
“ ‘fendant must have been held to be a trus-
“ ‘tee if the suit had been brought in proper
“ ‘time.’ (See also *Hovenden v. Lord An-*
“ ‘*nesley*, 2 Sch. & Lef., 633; *Wentworth v.*
“ ‘*Lloyd*, 32 Beav., 467, affirmed in the
“ ‘House of Lords, 10 H. L. C., 589.) To
“ ‘this effect the cases are very numerous.
“ * * * But what is the reasonable time
“ ‘within which a constructive trust must be
“ ‘asserted? The cases do not clearly define
“ ‘it, and perhaps it is incapable of strict
“ ‘definition. It must vary with the circum-
“ ‘stances of each case.”

Vide also *St. Louis, &c., R. Co. v.*
Terre Haute Co., 145 U. S., 393, by
GRAY, J., at p. 408; *Drake v. Sub-*
urban Co., 26 App. Div., 499, by
HATCH, J., at p. 513; *Stetson v.*
Northern Co., 104 Ia., 393, by GIVEN,
J., at p. 398.

This rule, it is clear, is applicable to the present case. The Tripartite Agreement was made on 17th August, 1894. It was not even sought to be repudiated by the plaintiff until long after the trial began — the first intimation of objection in the present record being on January 19th, 1904 (*fols.* 2046–2050). There were ten years of acquiescence, which lasted for more than eight years after the plaintiff’s present management came in on 14th January, 1896 (finding XLVIII, at *fol.* 704). They discovered “the facts,” so they say, and so the Referee found (XLIX, at *fols.* 704, 705) “within a short time

“ prior to the commencement of this action,” that is to say, a short time before 6th March, 1900 (*fol.* 12). The finding presumably relates to the facts set forth in plaintiff’s complaint. *There was no finding or proof* that they were ignorant of the Tripartite Agreement for one day after they came into power. And it is incredible that they should have been.

The testimony of plaintiff’s witness, Timothy S. Williams, who at the time of the trial was its vice-president (*fol.* 4769) shows clearly that he became aware of the Tripartite Agreement, and of the giving of the notes thereunder, in 1895 (*fol.* 4770), only a month or two after the notes had been paid for plaintiff by Flower & Co. (*fol.* 549). Nothing was done by him or any other officer of plaintiff by way of disaffirmance of the recently consummated transaction. Two years later, in 1897, a letter was sent to Mr. Merritt, defendant’s president, making certain inquiries concerning the financial relations of the parties. Mr. Merritt’s answer, so Mr. Williams testified, did not give him as great detail as he desired, and he was then given permission to examine defendant’s books (*fol.* 4796). The work of the accountants selected by him was not, however, done regularly and with diligence, but, to use Mr. Williams’ own words, “largely at “odd hours, and very frequently at night” (*fol.* 4796). Their report was made in January, 1900, almost *five years* after the plaintiff’s new management had full knowledge of the making of the Tripartite Agreement, and of the notes given thereunder. Surely a showing of such comfortable and leisurely procedure will not permit an entire reversal of this Agreement, unchallenged for so long a period, and in reliance upon the result of which defendant’s stockholders had been permitted to buy its stock at the very high figure which was its price before the rendition of the present judgment.

We ask the Court further to consider what part the Tripartite Agreement had had in the life and

administration of the Traction Company and all of its well and widely known career. The financial troubles in 1894 of the plaintiff, and more especially of the Traction Company which owned all of plaintiff's stock, must, upon the testimony below, have been well known to the business and financial community in Brooklyn and New York. The relations between the plaintiff and the Traction Company, on the one hand, and the defendant on the other, were most intimate ; indeed, it is of that very intimacy that plaintiff complains. Nine-tenths of the entire stock of the Traction Company had been open to subscription by the stockholders of defendant ; and there is no evidence to show that in August, 1894, the stock ownerships in the Traction Company and the defendant were not, in very preponderant part, identical. The Lease and the negotiations which led to it and the circumstances under which it was made, and the intentions of those making it, were perfectly known on both sides.

Not only the directors of defendant, but the directors of plaintiff and of the Traction Company, included, on 17th August, 1894, some of the best known and most honored men in the financial and business life of Brooklyn. Among plaintiff's directors were Felix Campbell, William Marshall, Theodore F. Jackson, E. W. Bliss, Crowell Hadden, Seth L. Keeney, John G. Jenkins, and others (*fols.* 8109, 8110). The same gentlemen were among the directors of the Traction Company. Among the directors of defendant were David G. Leggett, Seymour L. Husted, Jr., W. Cary Sanger, Alonzo Slote, William A. White (*fol.* 5764), Samuel W. Bowne, (*fols.* 5773, 5774), and Edward Merritt (*fol.* 5776). No doubt financial eminence has sometimes been found consistent with business immorality. But still, even in these days of "muck-raking" there is still some presumption in favor of the integrity of men bearing for a lifetime a widespread reputation for integrity. Upon read-

ing these names, it is not surprising that the plaintiff made no allegation, and gave no proof, of any fraud or fraudulent attempt on the part of those gentlemen. Defendant was no longer a "Wall Street" concern. Hollins & Co., the promoters of the original transaction, had no further part in these matters (*fols.* 5333-5336).

When the Tripartite Agreement was attacked before the Referee, four of the directors and accountants, E. W. Bliss (*fol.* 5335), W. A. H. Bogardus, Thomas P. Swin (*fol.* 7487) and Felix Campbell (*fol.* 5335), who had taken part in the transaction were dead. Over the memory of the others, there had been a lapse of ten years.

Under the agreement, plaintiff got from the defendant \$350,000 in new money. Nor did the defendant refuse to make the remainder of the advances which by that agreement it had promised. The Referee refused plaintiff's request to find such refusal (Plaintiff's Request XLIII at *fols.* 700, 701). The participation of the defendant with its undoubted and very high financial prestige, was the thing all essential to the success of the Tripartite Agreement, and enabled the plaintiff to procure from others the large advances by them recited in the agreement.

No criticism of the agreement was made until long after the present suit was begun. It was, indeed, ten years before any attack upon the agreement was made in court. There is no evidence that the plaintiff returned or offered to return any part of the advantage which it had got from defendant or from others.

It is submitted that this case is clearly within the rule, sustained by the authorities already quoted, that practical acquiescence, laches or undue delay will disable a corporation from repudiating an agreement made by its directors, although they may have had some adverse interest. The avoidance of the agreement by the Referee was in accordance with neither justice nor law.

THIRD PRINCIPAL QUESTION.

Tripartite Agreement, if voidable at all by plaintiff, is not so voidable in this suit.

Exceptions specially presenting this Question.

The exception to the Referee's conclusion directing judgment obviously presents this question. But it was also presented during the trial.

Plaintiff on its direct case attacked the agreement, at *fol.* 4595-4598 ; and it offered plaintiff's exhibits 1442 and 1443, being evidence of the adverse interest of its directors in August, 1894, and other dates. The Referee then being absent (*fol.* 4587), the ruling was delayed until the next meeting, when defendants objected to their reception (*fol.* 4688),

“ as entirely incompetent and irrelevant,
 “ that it makes no difference here as to
 “ whether they were stockholders in one
 “ company or another under any issue
 “ raised by this pleading.”

Thereupon plaintiff stated the substance of the exhibits; the Referee received them in evidence, and defendant excepted (*fol.* 4690).

Almost immediately thereafter, at the meeting before the Referee on 27th October, 1905, plaintiff—this still being its direct case—called John G. Jenkins as its witness to give testimony to show that the Tripartite Agreement was executed without proper examination of plaintiff's accounts by plaintiff's directors. Defendant objected to the testimony; but the Referee overruled the objection, defendant excepting (*fol.* 4736, 4737).

At the end of plaintiff's case, defendant moved

(*fols.* 4822, 4823) for dismissal on the grounds, among others (1), that the cause of action set forth in the complaint had not been made out, and (2) that the evidence failed to make out the cause of action set forth in the complaint. But, although the Tripartite Agreement had already been put in evidence (*fol.* 4429), the motion was denied, defendant excepting (*fols.* 4822-4831). On the submission of the case to the Referee, defendant asked a ruling that no recovery could be had because "the form of the present action is improper * * * and the judgment sought equitable in character" (*fol.* 640).

Plaintiff sued solely upon a strictly common law cause of action to recover damages for breach of an agreement (*vide supra*, at pp. 26, 31-34). No equitable cause of action was pleaded or even suggested in the complaint. No equitable relief was prayed. Again and again in its briefs on the trial plaintiff's counsel asserted the strictly common law character of the suit (Main Brief, p. 1, Reply Brief, p. 2).

On the trial, however, when confronted with the Tripartite Agreement, plaintiff asked to avoid it upon sheerly equitable grounds; and the Referee gave it that relief (findings for plaintiff XLVII, L, LI, LII, LIII, LIV, at *fols.* 703-709, all duly excepted to by defendant at *fols.* 785-787).

The Facts [*Third Principal Question.*]

Although the agreement was absolutely valid at law (authorities *supra*, pp. 191-193), no amendment of the complaint was made or asked for by plaintiff to turn this action at law for damages on the covenants of the Lease into an action for the equitable relief of an avoidance of the Tripartite Agreement. The Referee held with plaintiff. The judgment was entered and the appeal comes here solely upon the original strictly common law complaint.

The Referee in his Decision proper (*fols.* 724–746) absolutely ignored the Tripartite Agreement, unless the fourth conclusion of law (*fols.* 743, 744) that “there has been no accord and satisfaction between the plaintiff and defendant” be deemed a reference to it. In the findings of *fact* included in the Decision proper, there is no reference to the agreement or any other fact sustaining such conclusion. And, if reference be had to the findings outside of the Decision proper, the Referee’s refusal to give effect to the agreement appears to be based solely upon the supposed adverse interest of plaintiff’s directors who authorized the agreement, or of the directors of the Traction Company who authorized its execution by the latter company.

Upon the Law.

Where a plaintiff’s necessarily preliminary and primary relief—in order to obtain some other relief—is to get out of the way an agreement or situation which confronts him *and is valid at law*, he has no cause of action at law for his ultimately desired relief but only for the equitable relief from the obstacle of such agreement or situation. And he can maintain no action at law, but must sue for the equitable relief, as an incident and consequence to which he may ask equity to give him his ultimately desired legal remedy of damages or otherwise.

This question has been definitely set at rest by rulings of the Court of Appeals that the plaintiff’s judgment must be within the purview of the cause of action set forth in the complaint. The rulings we quote were made on the application of appellants raising the question of pleading and purview of the action.

Stephens v. Meriden Britannia Co., 160 N. Y., 178: This was an action in which a receiver in supplementary proceedings recovered for the con-

version of chattels. These chattels had been transferred to the defendant by the judgment-debtor, by virtue of a mortgage decided by the trial Court to have been in fraud of creditors. The Court of Appeals reversed the judgment, saying by VANN, J., at p. 185 :

“ The claim of the respondent that the
 “ judgment should be affirmed because the
 “ evidence is sufficient to support a bill in
 “ equity, is not well founded. The com-
 “ plaint is in the form of a pure action at
 “ law to recover damages for the conversion
 “ of personal property with no allegation to
 “ suggest a court of equity as the forum re-
 “ sorted to, except those essential to show
 “ the appointment of the plaintiff as re-
 “ ceiver, and hence that he had a legal
 “ capacity to sue. The plaintiff alleged
 “ that the defendants took possession of
 “ the property in question and ‘ unlaw-
 “ ‘ fully converted and disposed of the same
 “ ‘ to their own use,’ and that the damages
 “ sustained thereby amounted to \$3,000.
 “ The only relief demanded is for the re-
 “ covery of that sum and costs. There is
 “ not even a prayer for general relief. The
 “ trial was had without objection, in the
 “ usual way, before a jury; the verdict
 “ rendered was simply for a definite sum of
 “ money, and when the defendants moved
 “ to dismiss because the plaintiff had mis-
 “ taken his remedy, as an action at law
 “ would not lie, no suggestion was made
 “ that the court should grant relief in
 “ equity, and no such relief was granted.
 “ The fact that the judgment roll, execution
 “ and return thereof were read in evidence
 “ without objection did not authorize the
 “ court to award equitable relief, as such
 “ evidence was not received for that purpose,
 “ but simply to show that the plaintiff was
 “ duly appointed receiver. No motion was
 “ made to amend the complaint, and it
 “ stands as it was drawn, a pleading in a
 “ strict action at law.

“ The theory of the action as gathered
“ from the complaint, the method of trial
“ and the practice followed throughout the
“ history of the case have fastened it un-
“ changeably on the law side of the court.
“ It was brought there and tried there, and
“ there it must remain.”

This case was followed in *Gilroy v. Everson-Hickok Co.*, 118 App. Div., 733; affd. 190 N. Y., 551.

Hall v. LaFrance Fire Engine Co., 158 N. Y., 570. A deed was set up as a defence against an action of ejectment, which plaintiff claimed did not represent the real intentions of the parties and in reality had no relation to the title in question. Plaintiff recovered and the Court of Appeals reversed, saying by PARKER, *Ch. J.*, at p. 574:

“ The plaintiff saw fit to bring an action
“ in ejectment, and finds himself confronted
“ with a deed he executed and by which, in
“ terms, he grants to the defendant the
“ premises in controversy, and he is not in a
“ position to claim that the deed should be
“ so modified as to become such a deed as it
“ was his purpose to execute. * * * The
“ plaintiff should have brought a suit on the
“ equity side of the court to so reform the
“ deed that it should express the real agree-
“ ment of the parties. In this action he
“ must fail because of the existence of the
“ deed, executed by himself, by which, upon
“ its face, he grants to this defendant what-
“ ever interest he had in the premises in
“ suit.”

The recent case of *Smith v. Ryan*, 191 N. Y., 452, is also instructive. In that case a deed from an incompetent person was set up as a bar in an ejectment action. The Appellate Division held that such a deed must be set aside by a court of equity, and therefore dismissed the complaint. The Court of Appeals, on the contrary, held that such a deed

need not be set aside by a court of equity, but for the reason that the deed of an incompetent was equally invalid in a court of law. The distinction is clearly stated by CULLEN, *Ch. J.*, at p. 456:

“There are cases of constructive fraud”
 (and such is the case of a contract of the corporation in which a director is interested)
 “and those arising from false representations of a promissory character, in which relief can be had only in equity. Where, however, the fraud is of such a nature as would sustain a common law action of deceit, it may safely be said that the contract may be avoided either at law or in equity, at the election of the defrauded party.”

Brightson v. Claflin Co., 180 N. Y., 76, by O'BRIEN, *J.*, at pp. 80, 81 :

“The objection was to the effect that the proof was a departure from the cause of action stated in the complaint. * * *
 “The plaintiff pleaded a written contract for five years, and he recovered for breach of a contract implied by law for one year. We think that the plaintiff did not recover *secundum allegata et probata*, and that this rule was violated at the trial, since the evidence was received under the defendant's objection (*Southwick v. First Nat. Bank of Memphis*, 84 N. Y., 420; *Romeyn v. Sickles*, 108 *id.*, 650; *Day v. Town of New Lots*, 107 *id.*, 148). In these cases it was held that it is a fundamental rule that a judgment shall be *secundum allegata et probata*, and that any departure from that rule is certain to produce surprise, confusion and injustice. It was said, with much force, that pleadings and a distinct issue are essential in every system of jurisprudence and there can be no orderly administration of justice without them. If a party can allege one cause of

“ action and then recover upon another, his
“ complaint will serve no useful purpose,
“ but rather to ensnare and mislead his ad-
“ versary.”

Stevens v. New York, 84 N. Y., 296, by DAN-
FORTH, J., at p. 305:

“ But notwithstanding the liberality of
“ the law which permits this construction,
“ the plaintiff can have no relief which is
“ not ‘ consistent with the case made by his
“ ‘ complaint and embraced within the issue’
“ (Code, sec. 275). He must, therefore,
“ establish his allegations (*Salter v. Ham*,
“ 31 N. Y., 321; *Bradley v. Aldrich*, 40 *id.*,
“ 504; *Heywood v. Buffalo*, 14 *id.*, 540), and
“ if they warrant legal relief only, he cannot
“ have equitable relief upon the evidence.
“ He must bring his case within the allega-
“ tions as well as within the proof (*Bradley*
“ *v. Aldrich*, 40 N. Y., 504; *Arnold v. An-*
“ *gell*, 62 *id.*, 508; *People's Bank v. Mitchell*,
“ 73 *id.*, 415).”

The rule avoiding contracts made by interested directors is only a branch of the principle governing the acts of all trustees. And in precisely such a case it has been held by this Court that the act of the trustee was a complete obstacle in any action based on its supposed invalidity until and unless set aside by a Court of Equity.

Dugan v. Denyse, 13 App. Div., 214: A guardian *ad litem* had himself bought in the property of his wards prior to the statute making such purchase void. Upon the coming of age of the wards, they brought an action of ejectment. The head note reads:

“ That the common law doctrine prohibit-
“ ing the purchase under such circumstances
“ by one occupying a fiduciary position
“ was only enforceable in equity.”

By HATCH, J., at page 216 :

“ There is, however, this distinction, which
“ becomes of controlling importance in this
“ case, that whereas the statutory prohibi-
“ tion rendered the sale absolutely void, the
“ common law principle, enforced as an
“ equitable rule, made such sale voidable
“ only, at the instance of the *cestui que trust*
“ (*Forbes v. Halsey*, 26 N. Y., 53-65; *Barr*
“ *v. N. Y., L. E. & W. R. R. Co.*, 125 *id.*,
“ 263-277; *Harrington v. Erie Co. Savings*
“ *Bank*, 101 *id.*, 257). * * * (p. 217) A
“ case is, therefore, presented which is pe-
“ culiarly the subject of equitable cogni-
“ zance.

“ It follows that, within the doctrine of
“ the cases cited, this action cannot be
“ maintained.”

FOURTH PRINCIPAL QUESTION.

Defendant's complete compliance with plaintiff's requests for expenditure made under the Lease.

Plaintiff's recovery was for a principal sum of \$1,740,258.38 (with interest), of no part of which, according to the findings and the proofs below, had plaintiff requested from defendant the expenditure before this action was begun. For this reason, plaintiff failed to establish the cause of action which it had pleaded, and the only cause of action which it presented for adjudication by the Referee. This objection applies to the entire cause of action.

Exceptions specially presenting the Question.

Defendant's objection raising this question was specifically made upon the motions to dismiss at the end of plaintiff's case at *fol.* 4830 and at the end of the entire case at *fol.* 7539. The exception at *fol.* 4831 covers the first of those rulings; and the exception at *fol.* 767 to the sixth conclusion (*fols.* 744, 745) that plaintiff was entitled to judgment covers the second, as does the more specific exception at *fol.* 789 to the Referee's refusal of the conclusion No. 14 at *fol.* 643. At *fols.* 529-531 the Court will find defendant's requests Nos. 100, 101 and 102 for findings of fact that plaintiff made no request upon defendant for the expenditure upon conversion of the moneys which plaintiff has here recovered, and defendant's exceptions to the refusals so to find are at *fols.* 803, 804.

Facts. [*Fourth Principal Question.*]

The present suit, as we have pointed out (*supra*, p. 214), was brought, not in equity, but strictly at law, to recover damages,—or, at any rate, a specific sum of money—claimed by plaintiff to be due it by

reason of the defendant's alleged breach of its contract obligation under Article V, that it would provide \$6,000,000, the proceeds of additional stock and bonds to be issued by it, and that such proceeds should (Lease, *fols.* 70, 71)

“be expended by the lessor” (the defendant) “in payment, at the request of the lessee” (the plaintiff) “from time to time of the cost of converting the railroads of the lessor into an electric railroad * * *.”

Plaintiff thus stated its cause of action to the Referee (its reply brief below at p. 2):

“The action is in fact brought to recover damages caused to the plaintiff by reason of the fact that it had expended approximately \$2,000,000 for purposes for which the defendant agreed immediately to reimburse the plaintiff, under the terms of the lease, the damages being occasioned by the failure of the defendant to make such reimbursement.”

We may point out parenthetically, that the lease contained no such provision that defendant should “reimburse the plaintiff” or to make any payment to plaintiff (except on assuming the property at the end of the Lease); but with that we deal elsewhere.

The first words of plaintiff's principal brief below were these (p. 1):

“The complaint herein demands judgment for \$2,000,000 and interest *damages* for the defendant's breach of its agreements contained in Article V of the Lease.”

That covenant was, and is, the basis of plaintiff's alleged cause of action. In its complaint it alleged (*fols.* 24, 25) that such \$6,000,000—

“was the amount which in and by said lease the defendant agreed should be expended *by the defendant* in payment *at the request of the plaintiff* from time to time of the cost of converting the railroads * * *.”

The plaintiff in its complaint then alleged (*fol.* 27) the further fact, obviously indispensable to its cause of action, that—

“the plaintiff from time to time, *prior to September 30, 1894, requested the expenditure by the defendant of the said last mentioned sum*” (that is to say, \$6,000,000), “in payment of the cost of converting the said railroads * * *” (*Complaint, fol. 27*).

There then remained, as necessary in order to make a cause of action, *an allegation of the further fact that defendant had failed*, before plaintiff made its expenditure for the amount of which it sues and which was rendered necessary by defendant’s default—to *make the expenditure thus requested*. The complaint contains no such allegation; but only the allegation (*fols. 28, 29*) that

“defendant had not prior to September 30, 1894, and has not prior to the commencement of this action expended more than the said sum of four million dollars (\$4,000,000) for any or all of the purposes for which the defendant covenanted and agreed in and by the lease to expend the proceeds of said stock and bonds * * *.”

The Court will observe that, according to the complaint, the thing requested had been (*fol. 21*) the expenditure of \$6,000,000

“in payment, at the request of the plaintiff from time to time, *of the cost of converting the railroads * * **”;

but that the thing in which defendant defaulted was (*fols. 28, 29*) the expenditure of the money

“for any or all of the purposes for which the defendant covenanted and agreed in and by the lease.”

This last allegation is a mere conclusion of law, for it depends upon the interpretation of the Lease. (*Chauvrant v. Maillard*, 4 N. Y. Supp., 126 ;

Picker v. Weiss, 39 Misc., 22). How the Lease ought in this respect to be interpreted, is one of the chief questions of law in the case. That defendant did after 14th February, 1893, expend in payment of conversion more than \$6,000,000, was found by the Referee (*supra*, p. 152. *Vide* findings XXXVIII at *fols.* 692-694, A-75 at *fol.* 628, A-36 at *fols.* 560-561).

The complaint further alleged that (*fols.* 30, 31)

“ plaintiff had from time to time, at various times prior to September 30, 1894, demanded and requested the payment by the defendant to the plaintiff of the said sum of two million dollars (\$2,000,000)” (the sum alleged by plaintiff to have been expended over and above what had been advanced by defendant), “ which payment would have been an expenditure by the defendant in payment of the cost of converting the said demised railroads into an electric railroad as the defendant had agreed to do in and by said lease.”

This allegation was denied by defendant's answer (*fol.* 167). No evidence was introduced in support of it, and the Referee has found directly to the contrary.

The Decision proper contains no statement whatever that defendant had failed to pay or apply any money to or upon conversion, which plaintiff requested defendant to pay or apply.

Decision, *fols.* 724-746.

The fourteenth finding of so-called “ fact ” that there was “ a balance due and owing under the terms of the lease from the said defendant to the plaintiff ” is, of course, a mere conclusion of law.

Sparks v. Ducas, 123 App. Div., 507.

Tate v. Am. Woolen Co., 114 App. Div., 106.

McKyring v. Bull, 16 N. Y., 297.

Thus far there is no solution for the real dispute whether defendant's conceded and found expendi-

ture on conversion of more than \$6,000,000 satisfied the plaintiff's request which was alleged in the complaint and admitted by the answer. That admission, we must, in passing, again point out, was coupled with, and limited by, the allegation that the amount requested—and more—had in fact been expended, and further coupled with, and limited by, defendant's denial of a request to expend the sum for which plaintiff sought a recovery. But the solution is provided by the Referee's own findings which absolutely sustain the contention of defendant's answer that defendant did comply with every request made upon it by plaintiff. For, while defendant by its answer (*fol.* 163), admitted the second of plaintiff's allegations above recited—that is to say, the allegation as to the request, the admission was, as we have just said, modified and limited by the insistence (*fols.* 164–166) that it had fully complied with every request made by plaintiff and that plaintiff had never requested any expenditure in addition to that which it had made (*fols.* 167, 29–31). And this position was entirely sustained by the Referee in his finding A-14 (*fol.* 543) as follows :

“ Plaintiff did not, until after the year
“ 1894, make any claim that there was any
“ sum of money due by defendant to it under
“ the lease dated 14th February, 1893, other
“ than sums which *were* paid by defendant
“ to plaintiff before the end of 1894,”

and in finding A-44, at *fols.* 581, 582, that—

“ Plaintiff did not, prior to the year 1895,
“ request the expenditure of any money by
“ defendant on conversion *other than the*
“ *monies which were so expended by de-*
“ *fendant.*”

Plaintiff's cause of action, it will be remembered, is alleged to have arisen on 30th September, 1894.

Complaint, *fols.* 27, 31, 33.

Nor is it possible to predicate of a date later than 1894, any request by plaintiff to defendant, which

was *not* complied with by defendant, to expend in conversion the amount of plaintiff's recovery, or any part of it. As to this the record is clear.

The very finding proposed by plaintiff and adopted by the Referee did not state or assume that any request had ever been made by plaintiff upon the defendant to apply any money upon conversion which had not been so applied. It is a finding merely that certain moneys had not been paid over *to plaintiff* by defendant upon demand. The finding is in the following words (finding XLIV, at *fol.* 701):

“ Prior to the commencement of this action, plaintiff demanded of the defendant the payment by the defendant to the plaintiff of the balance remaining of said \$6,000,-000 not expended by defendant under Art. V of the Lease, which demand was refused.”

That finding is, however, amplified and explained by a further finding of the Referee which gives the terms of this “demand.”

In finding A-46 at *fol.* 582, 583 the Referee found that—

“ The *only* request in that respect ” (that is to say, the defendant's expenditure of money for conversion) “ made by plaintiff to defendant after the year 1894, and before the commencement of this action, was made on the 2d day of March, 1900, and was in writing * * * .”

The letter of March, 1900, which is set forth in this finding refers to an earlier letter written by plaintiff to defendant dated 10th July, 1897. But such earlier letter made no request for any payment whatever and consisted entirely, except as to immaterial formalities, of eight inquiries as follows (finding A-46, at *fol.* 594-598):

1. As to the amount of defendant's

“ monies, credits and securities * * * on hand June 6th, 1893, which were accepted by paragraph III of the lease from the property leased and the amount

“ of which was by paragraph IV * * * to
“ be expended * * * for conversion pur-
“ poses after deducting therefrom certain
“ amounts of indebtedness and surplus earn-
“ ings * * * ” (*fol.* 594, 595).

2. The—

“ amount required to pay and discharge
“ the indebtedness, obligations and liabili-
“ ties of ” defendant “ as of June 6th, 1893,
“ other than its bonded indebtedness * * * ”
(*fol.* 595).

3. The amount of defendant's surplus on 6th
June, 1893 (*fol.* 596).

4, 5 and 6. The *pro rata* amount of accrued in-
terest, rentals and taxes as referred to in
such paragraph IV (*fol.* 596, 597).

7. An

“ itemized statement of the expendi-
“ ture by the Brooklyn City R. R. Co.
“ of the \$6,000,000 proceeds of stock and
“ bonds * * * ” (*fol.* 597).

8. An

“ itemized statement of the expenditure
“ * * * of the surplus of ‘ moneys, credits
“ ‘ and securities ’ on hand June 6th, 1893,
“ over and above the deductions author-
“ ized * * * ” (*fol.* 597, 598).

Recurring now to the letter of 2d March, 1900,
which the Referee in such finding A-46, *fol.* 582-
593 found to be plaintiff's “ only request ” after the
year 1894—the Referee having already found, as
stated above, in findings A-14 and A-44, that plaintiff
made no request in or before 1894 with respect to ex-
penditure of money, with which defendant did not
comply—we find that, after referring to plaintiff's
earlier letter already cited and defendant's response
to it, plaintiff asserted in such later letter (*fol.*
585, 586) that many of the charges against said—

“ proceeds of the \$3,000,000 of stock and
“ \$3,000,000 of bonds were not authorized
“ by the terms of the lease and * * *
“ that in particular the following entries

“ appearing on the books ” of the defendant
 “ are not properly chargeable as expenditures
 “ to the said fund.”

Such items objected to are as follows (*fols.* 586-590), the dates first given being the dates of items in this litigation generally known as “ Journal Entries ” and which are fully discussed and defended later on in this brief (*infra*, pp. 297-336). We shall ask the Court to note that a number of these items (*viz.*, items 4, 5, 7, 8, 9 and 12) were on the trial wholly or in part abandoned by plaintiff's counsel :

1. June 30, 1893: \$27,619.67 for interest on loans;
2. June 30, 1893: \$90,000, portion of a dividend paid prior to the date of the lease;
3. June 30, 1893: \$161,397.23, “ being arbitrary transfers from operating accounts to construction accounts * * * ”;
4. February 28th, 1894: \$10,000, “ correcting a credit entry to real estate * * * ”;
5. May, 1894: \$4,884.14 for taxes for 1892;
6. March 31st, 1894: \$134,775.16 (reduced by \$11,474.40 by journal entry of June 30, 1895), transferred from supply account to construction account;
7. January, 1894: \$1,000, services of W. A. H. Bogardus;
8. February, 1894: \$730, services of E. D. White;
9. \$76,275.94 “ apparent overcharge to construction * * * on motors and controller equipments * * * ”;
10. March 31st, 1894: \$150,245.79, “ transfer from surplus to construction * * * ”;
11. August, 1894: \$41,655.41, “ interest on * * * a portion of defendant's surplus * * * ”;
12. 28th February, 1894: \$80,000, “ payment * * * for generators * * * ”.

After such specification of items of the “ journal entries ” together amounting to \$778,583.34 the plaintiff, referring to advice from its lawyers, said (*fols.* 591, 592) :

“ If this advice is correct, it would seem
 “ that that portion of the charges compris-

“ing the \$6,000,000 for supplies, labor,
“services, material or property furnished
“or acquired prior to June 6, 1893, was im-
“properly made under the terms of the lease.”

Thus far in such letter of 2d March, 1900, the Court will perceive that there had been no request. The only *request* was in the concluding paragraph of the letter, as follows (*fol.* 592):

“The Brooklyn Heights Railroad Com-
pany herewith requests prompt *payment*
“of the amounts above indicated *as due to*
“it under Article V of the Lease,” (that is to say, the amounts of the “journal entries”)
“with interest from March 10, 1894, and
“that an *accounting* be had as promptly as
“practicable as to the remainder of the
“\$6,000,000 fund, in order that this long
“standing account may be finally closed.”

The Court will perceive, therefore, that not only was it true, as the Referee found in A-14 and A-44, that in or before 1894 no request for expenditure was made by plaintiff which was not honored by defendant; but that, according to finding A-46, no request whatever for expenditure by defendant in conversion was thereafter made. No demand for money was made prior to 2nd March, 1900; and no demand was then, or thereafter or before the commencement of this action, made, unless for the amounts of such “journal entries,” amounting in all to \$778,583.34.

And the demand, if it were one, of 2nd March, 1900 (four days before the commencement of this action), was—not the request, called for by Art. V of the Lease, to apply moneys in payment of cost of conversion, but a request—to pay the sum of \$778,583.34 claimed to have been due plaintiff *as a debt*.

As to the alleged unexpended balance of the \$6,000,000, there was no demand whatever for payment but a mere request for “an *accounting*
“* * * as promptly as practicable * * * in

“order that this long standing account may be
“finally closed” (*fol.* 592).

The Court will remember that plaintiff did not, however, in this action sue, and has, since the action was brought, steadfastly insisted that it had not sued, for an accounting. The suit was brought and decided by the Referee upon plaintiff's allegations (Complaint, *fols.* 26-33) that it was entitled to recover from defendant for a breach of contract a sum equal to the portion of the \$6,000,000 fund which, as so alleged, defendant had not expended in conversion. Obviously enough the demand of 2d March 1900 “for an accounting
“* * * as to the remainder of the \$6,000,000
“fund” was not a request or demand, within the meaning of the Lease, that certain amounts in, or to get into, the hands of the defendant, and to be applicable to conversion, should be expended by it in payment of the cost of conversion.

We are now ready again to ask the Court's attention to the plaintiff's allegations in its complaint that—

“the plaintiff from time to time, prior
“to September 30th, 1894, *requested* the
“expenditure by the defendant of the
“said last-mentioned sum * * *” (that
is to say, the \$6,000,000) in payment of the
cost of “converting the said railroads” (Com-
plaint, *fols.* 27, 28)

and that

“plaintiff had from time to time at va-
“rious times prior to September 30th, 1894,
“demanded and requested the payment by
“the defendant to the plaintiff of the said
“sum of two million dollars (\$2,000,000)”
(the sum alleged by plaintiff to have been
expended by it over and above what had
been advanced by defendant) “which pay-
“ment would have been an expenditure by
“the defendant in payment of the cost of
“converting the said demised railroads into

“ an electric railroad as the defendant had
“ agreed to do in and by said lease ” (Com-
plaint, *fols.* 30-31).

Defendant submits that not only such *request* but *defendant's failure to comply with it*, were essential to the plaintiff's cause of action. As no such request *which was not complied with* was found by the Referee or any proof thereof given, and as the Referee found that defendant had complied with every request for expenditure on conversion which was made, it is plain that plaintiff cannot rightly recover. Certainly not under the provisions of the Lease or the theory of its own complaint. Indeed, the Referee's finding A-44 at *fols.* 581, 582 that—

“ plaintiff did not, prior to the year 1895,
“ request the expenditure of any money by
“ defendant on conversion other than the
“ moneys which *were* so expended by de-
“ fendant ”

is in harmony with the very theory upon which plaintiff tried the case and called for by undisputed testimony. It is in harmony with the Referee's refusal to find plaintiff's request XLIII (*fols.* 700, 701) that, in March, 1894, defendant—

“ refused to advance any further funds to
“ the plaintiff on account of the conversion
“ of defendant's railroads from horse to elec-
“ tricity * * * ”

In harmony with this also is the testimony of Alfred A. Noble, plaintiff's own witness, when questioned by its counsel:

“ Q. Did you know anything about the
“ Brooklyn City refusing to pay any more
“ money on account of construction and con-
“ version in March, 1894, at the time of the
“ third account ?

“ A. I do not know of any refusal ” (*fols.*
4455, 4456).

The finding A-44, it will be observed, is consistent with the allegation of the plaintiff at *fols.* 27, 28,

of its complaint, that "the plaintiff from time
 " to time, *prior to September, 30, 1894*, requested
 " the expenditure by the defendant of" \$6,000,000
 " in payment of the cost of converting the said
 " railroads." In fact prior to that date and after
 14th February, 1893, defendant expended in con-
 version much more than \$6,000,000 (*vide, supra*,
 p. 152). The finding A-44 is, however, absolutely
 inconsistent with the necessary and entirely un-
 proved allegation later on in the complaint that
 plaintiff had requested, and defendant had refused,
 payment of conversion expenditure over and above
 advances and payments actually made by defendant.

In his Decision the Referee made no finding of
 any request by plaintiff with which defendant
 failed to comply. In the Decision he found de-
 fendant's conversion expenditure to have been
 \$4,259,741.62 (finding Twelfth at *fol.* 740); but
 he did not find any failure to expend, upon re-
 quest or otherwise, \$6,000,000, unless in the mere
 conclusion of law called a "finding of fact" in
 the Decision (finding Fourteenth at *fols.* 741-742)
 that there was

" a balance due and owing under the
 " terms of said lease from the said de-
 " fendant to the plaintiff of \$1,740,258.38
 " with interest * * *,"

or unless in finding XL, made on plaintiff's request,
fol. 698, and which, we submit, was also a con-
 clusion of law that—

" Said sum of \$4,259,741.62 was the NET
 " amount of all payments made at any
 " time by defendant *in fulfillment of its*
 " obligation under Article V of the lease to
 " issue \$3,000,000 of its capital stock * * *
 " and * * * \$3,000,000 of its bonds,
 " and that the proceeds * * * should
 " be expended by the lessor in payment
 " at the request of the lessee from time to
 " time of the cost of converting the rail-
 " roads * * *,"

If the finding A-44, at *fol.* 581, 582, which was a true finding of *fact*, that—

“Plaintiff did not, prior to the year 1895,
“request the expenditure of any money by
“defendant on conversion other than the
“moneys which were so expended by de-
“fendant,”

be said by plaintiff to be inconsistent with such other findings, not only do we answer that the other findings as to what defendant owes plaintiff and as to the “net amount of all payments made “* * * in fulfilment of its obligations under “Article V” were in truth conclusions of law and not findings of fact, and that, if findings be inconsistent, the finding most favorable to appellant must be preferred (authorities, *supra*, p. 53); but we answer further that the finding of the Referee that defendant expended all the moneys it was requested to expend, is strictly consistent with the undisputed testimony.

ON THE LAW. [*Fourth Principal Question.*]

POINT I. [*Fourth Principal Question.*]

The defendant having expended on conversion all the moneys which plaintiff requested it to expend, plaintiff cannot, according to the Lease or to the case set forth in the complaint, recover for any default of defendant.

According to the finding A-44 at *fol.* 581, 582, defendant met all requests made prior to the year 1895. The present judgment must therefore be reversed for the reason that it is grounded upon a supposititious default of defendant in 1894, on

1st September or, as corrected, 26th October, and not upon any other default.

Nor, as has now been shown at length (*supra*, pp. 225-230), was there any request after 1894 and before the commencement of this action that defendant should expend any moneys in conversion. In fact plaintiff's communication of 2d March, 1900, sent just before this action was brought—which, as the Referee found (finding A-46 at *fol.* 582-593), was the only other communication by way of demand which was made before the suit was brought—was, as already shown (*supra*, pp. 226-230), not a demand for expenditure on conversion, but for defendant's payment to plaintiff, *as a debt*, of certain sums of money—altogether \$778,493.38, the amounts of the so-called “journal entries,” to which was joined a demand for an “accounting” as to the \$6,000,000 fund. The demand seemed to imply plaintiff's approval at that time of the theory which had been acted upon by the parties continuously until that time—and which defendant has since maintained and now maintains to be the only correct one—that defendant's obligation under the Lease was to furnish plaintiff with a railroad and equipment upon which the sum of \$18,925,000 had been expended by defendant. The assertion of the letter was that the sum of \$778,583.34 appearing on defendant's books to have been expended as a part of the \$18,925,000, was in fact not a proper charge to construction or equipment.

On the trial, as we have said, some of these items were conceded by plaintiff to have been properly so charged (*supra*, p. 228); and the correctness of those which plaintiff still attacks is discussed under the *Seventh Principal Question* (*infra*, pp. 297-336). In considering this *Fourth Principal Question* we wish to point out only that, irrespective of whether these entries had been rightly or wrongly made, the demand of the latter was made on a different

theory from that urged by plaintiff upon the trial and upon which it recovered its judgment below. It was not a demand for the sum recovered below, or for the sums making it up, or for any of them (Findings A-42, A-43 at *fols.* 567-581), but a demand for altogether different sums which entered into the Tripartite adjustment, but do not once appear in all the mass of findings, made by the Referee concerning the calculations upon which the recovery is based, whether in his Decision proper or upon the request of plaintiff or of defendant.

This objection that plaintiff has shown no request by it under the Lease, with which defendant has not complied, sustained by the Referee's findings that there was no such request, is, therefore, not only an objection to the enormous allowance of interest on plaintiff's claim, but is a valid and complete objection to the entire claim itself.

POINT II. [*Fourth Principal Question.*]

Defendant's admission of the request to expend \$6,000,000 pleaded in the complaint cannot avail plaintiff.

The admission by the answer (*fol.* 163) of the allegations of the complaint (*fols.* 27, 28),

“ that the plaintiff from time to time,
“ prior to September 30, 1894, requested the
“ expenditure by the defendant of the said
“ last-mentioned sum ” (\$6,000,000) “ in
“ payment of the cost of converting the said
“ railroads, * * * and the defendant, in ac-
“ cordance with such requests, did from time
“ to time expend prior to September 30, 1894,
“ various portions of said last-mentioned
“ sums in payment of the cost of converting
“ the said railroads * * * ”

affords plaintiff no help And for the reason, among others, that defendant, as was found (findings A-36 at *fol.* 560, 561 and A-5 at *fol.* 535, 536), *did* expend prior to 1st August, 1894, and after 14th February, 1893, "not less than \$6,400,587.14." So that the request admitted by the answer was complied with and satisfied. Any other and further request for moneys not expended by defendant was expressly denied by Paragraph VI of the Answer (*fol.* 167).

And there is a further reason. Even if, as against the finding and undisputed fact that defendant did expend on conversion every sum that it was requested by plaintiff to expend, there were a finding which is inconsistent with it, to the effect that defendant had failed to expend the full sum of \$6,000,000 which plaintiff had requested it to expend, this Court will accept the finding most favorable to appellant. That such inconsistencies in findings if they exist must be so resolved in favor of appellant has been shown to be well settled (*supra*, p. 53).

Moreover, not only is the admission of the answer at *fol.* 163 fully satisfied by defendant's expenditure of "not less than \$6,400,587.14" as established by findings A-5 and A-36, but the admission must be construed with the succeeding allegation in the same paragraph V of the answer (*fol.* 166),

"that prior to September 30th, 1894, it
 "had expended the entire proceeds of said
 "stock and bonds and large sums out of its
 "funds in addition thereto in payment of the
 "cost of converting the railroads, * * *
 "and that such expenditures were made
 " * * * at the request of the said plain-
 "tiff."

And in addition to this there must be considered the direct denial by defendant that plaintiff had requested the expenditure of the sum sought to

Ans. adm't'd only req. found to have been satis'd. 237

be recovered by it (Answer, *fol.* 167, complaint, *fols.* 30, 31). Admissions are to be construed with the accompanying allegations and denials of the pleading in order to get the real intent of the party; they are not to be isolated with the result of imputing to the pleader what he did not mean.

De Waltoff v. Third Avenue R. R. Co., 75 App. Div., 351, by JENKS, J., at p. 353 :

“ If a plaintiff would avail himself of an admission in an answer as a pleading, he must accept it entirely; he cannot accept a part and reject a part thereof.”

Shrady v. Shrady, 42 App. Div., 9, by McLAUGHLIN, J., at p. 13 :

“ The general rule is that, upon the trial of an action, where the plaintiff desires to avail himself of an admission or allegation contained in an answer as a pleading, he must accept the admission or allegation as an entirety; he cannot accept such portion of it as may be favorable to him and reject the remainder.”

Vanderbilt v. Schreyer, 21 Hun, 537, by BARRETT, J., at p. 541 :

“ It seems, too, that the admission was coupled with an affirmative allegation. Now the rule is well settled that the paragraph in which the admission and the allegation are blended cannot be severed. The plaintiff could not, therefore, have concluded the defendant by this admission without accepting the immediate surroundings, which, as these surroundings embraced the entire affirmative defense would have been equally fatal to him.”

Grant v. Pratt & Lambert, 52 App. Div., 540, by HATCH, J., at p. 546:

“ The rule governing the effect of admis-

“ sions contained in a pleading requires that
 “ the matter shall be taken as a whole, and
 “ the admission is limited by any statement
 “ therein which qualifies or explains (*Oakley*
 “ v. *Oakley*, 69 Hun, 121; aff'd on appeal,
 “ 144 N. Y., 637).”

POINT III. [*Fourth Principal Question.*]

Plaintiff's demand immediately prior to suing does not avail it; it was not a request for expenditure on conversion.

The Referee found in response to plaintiff's request XLIV (*fol.* 701), as already stated, that—

“ Prior to the commencement of this action
 “ plaintiff demanded of the defendant the
 “ payment by the defendant *to the plaintiff*
 “ of the balance remaining of said \$6,000,000
 “ not expended by defendant under Article V
 “ of the lease, which demand was refused.”

But this does not alter the situation. For, obviously, such demand was not a request for expenditure in conversion, but merely a demand of an amount claimed to be due under a complete cause of action—a cause of action which would be incomplete unless defendant had already refused a request that defendant expend money in payment of the cost of converting the railroads. And this demand was, as we have seen, not for a payment upon the basis of the recovery allowed by the Referee, but for entirely different sums, and based upon an entirely different conception of the relations of the parties from that asserted by plaintiff in this suit.

Plaintiff and the Referee overlooked, or ignored, the fact that neither Article V nor any other part of the Lease contained any promise whatever by

defendant to repay *plaintiff* any money whatever, except only that in Article X (*fol.* 78) defendant agreed that at—

“ the expiration of this lease, or other
“ sooner termination thereof, it will pay to
“ the lessee the actual cost * * * paid
“ for by lessee out of its own funds * * * .”

Plaintiff's alleged payment of \$1,740,258.38, for which it has recovered judgment is not alleged to have been made under any provision of the Lease; indeed the Lease forbade plaintiff to construct

“ any * * * improvements, or furnish
“ any equipment * * * to be paid for
“ out of its own funds other than such as
“ shall be necessary to keep said railroads
“ * * * in good condition and repair, and
“ to preserve efficiency in the operation * * *
“ until after the said unissued stock and bonds
“ of the lessor shall have been issued, and
“ the proceeds * * * expended as in this
“ lease provided * * * ” (Lease, Art. XXI,
at *fol.* 92, 93).

Plaintiff's allegation is, and plaintiff's theory is, that such payment was an expense necessarily incurred by plaintiff by reason of defendant's earlier default and, therefore, the measure of damages by reason of such earlier default. That earlier default, however, had to be proved and found—as it had been alleged—in order to make out a cause of action. And such earlier default was neither proved nor found by the Referee, but is negatived by his express finding A-44 at *fol.* 582.

POINT IV. [*Fourth Principal Question.*]**Plaintiff's answer to this argument.**

Plaintiff's only answer below to the present argument of defendant was in its reply brief before the Referee, at p. 47, being there its Point Thirteenth. Here is the whole of it :

“ The defendant does not question the fact
 “ that the expenditure of over \$2,000,000
 “ was made by the plaintiff out of its own
 “ funds. *It cannot question the fact that*
 “ *demand was made upon the defendant for*
 “ *reimbursement, nor can it question the*
 “ *fact that in March, 1894, the directors of*
 “ *the defendant passed a resolution not to*
 “ *make any further advances to plaintiff.*
 “ Therefore, no demand was necessary.”

But the Referee refused to find the facts claimed by the plaintiff in the words which we have italicized (Plaintiff's request XLIII with the Referee's refusal, at *fols.* 700, 701); nor is there the slightest evidence of such facts. And the plaintiff missed the point. A refusal of defendant in March, 1894—even if it had occurred—to make further advances *to plaintiff*, would not have been a breach of defendant's obligation under the Lease. Defendant's obligation was, not to pay moneys to plaintiff, but that it would *itself* apply certain moneys in payment of conversion cost (Lease, at *fols.* 70, 71, 72). Defendant nowhere in the Lease promised to pay money to plaintiff; nor is any such covenant claimed or sued on. Plaintiff might or might not request from defendant the application of moneys in payment for conversion expenditure.

If the expenditure of any given part of those moneys were not required for electrification cost,

then such part of those moneys was to be expended in payment (Lease, *fol.* 71, 68)—

“of the cost of such additions, improvements, extensions, branches and equipments to the said railroads and properties of the lessor as in its judgment and in that of the lessee shall be necessary or advantageous to the property of the lessor or the interest of the lessee, other than those necessary to keep the said railroads * * * in good condition and repair and * * * to preserve or secure efficiency in the operation * * *.”

It was obviously competent to the plaintiff, after the Lease was made, to refrain from making any “request” whether “from time to time,” or at one time, or at all, for a dollar of payment by it for conversion. And if it did so refrain, not a dollar would be due from defendant for conversion; but instead, and according to the express provisions of the Lease of February, 1893, the total amount to be provided by defendant would remain available for such other improvements as might be approved by both parties in place of conversion—less, of course, such payment of cost of conversion as should be included in defendant’s payment of its own debt, which, by the Lease itself defendant promised to pay (Art. IV, at *fol.* 69). In other words, the plaintiff had the option to request from time to time defendant’s expenditure of the stipulated sum in payment for either—

- (1) Conversion, or
- (2) Other improvements agreed on, or
- (3) To request it in part for conversion and in part for other improvements.

Provided, of course, that the part of such stipulated sum so available would be the remainder

thereof after payment of cost of conversion already incurred by defendant but not yet paid for.

And, until the plaintiff exercised its option between those three alternatives, there was absolutely no obligation on defendant's part to pay out any money or to do more than keep itself ready to provide the money when plaintiff should from time to time request its expenditure.

Or plaintiff could, if it saw fit, refrain from any request to defendant to apply moneys in conversion, and itself (plaintiff) make the expenditure for such conversion. In that case plaintiff would have no cause of action against defendant. Plaintiff would simply have reserved the right to call upon defendant for the same expenditure in other and additional construction under Art. V of the Lease.

This question, *Whether plaintiff were not bound to plead, and to prove, and to procure the Referee to find, its requests from time to time addressed to defendant, and in that way plaintiff's exercise of its option and then to plead and prove and procure the Referee to find, that such requests were not complied with*, thus goes to the very establishment of any cause of action on plaintiff's part.

FIFTH PRINCIPAL QUESTION.

Plaintiff did not at the commencement of this suit own the alleged cause of action.

The averment of the answer was (*fol.* 167) that plaintiff was not the

“ owner of the claim, demand or cause of
“ action mentioned and set forth in the com-
“ plaint or of any part of it.”

The question thus raised was thoroughly tried ; much evidence was presented upon it and the Referee, ruling it in plaintiff's favor, presented the facts in ample findings.

Finding 51 at *fol.* 384-388.

Finding 53 at *fol.* 389-393.

Findings 76, 77, 78, 79, 80, 81, 82, 83,
84, 86, 87, 88, 89, 91, 92, 93 and 94
at *fol.* 423-506, 508-524.

Finding A-16 at *fol.* 546.

Finding A-21 at *fol.* 550 correcting find-
ing 89.

Findings A-68, A-69 and A-70 at *fol.*
621, 622.

Exceptions especially presenting this Question.

The question was also presented by the motion to dismiss made at the end of the case (*fol.* 7540) which was ruled upon adversely by the Referee's Decision, and is specifically covered by the exception at *fol.* 808 to defendant's proposed conclusion of law 14 at *fol.* 643.

At *fol.* 526 and 528, defendant requested findings of fact that plaintiff was not the owner of the

cause of action. These findings were refused and the exceptions to the refusal are at *fol.* 802.

The exceptions at *fol.* 810, 811 to the refusals of the Referee to make conclusions of law proposed by defendant, Nos. 22 and 23 at *fol.* 647 likewise present this question.

The Facts. [*Fifth Principal Question.*]

Plaintiff's demand upon which it recovered judgment below had, in larger part, matured on 1st August, 1894. We have shown at length in our statement of facts as to the Tripartite Agreement under the *Second Principal Question* (*supra*, at p. 152) that, on that day, defendant had made all of the conversion expenditure which defendant ever made; and the Referee has found that plaintiff had, on such 1st August, 1894, made conversion expenditure of \$1,115,400.71 (finding A-47 at *fol.* 599) out of the \$1,740,258.38 of principal below recovered by plaintiff which, if plaintiff's cause of action be valid, was on 1st August, 1894, owing by defendant to plaintiff. Plaintiff's entire demand matured by 26th October, 1894, so the Referee decided—basing the decision on the finding that, on that date, plaintiff's conversion expenditure, necessitated by defendant's alleged default, had reached the amount of the principal of the recovery, \$1,740,258.38 (supplemental finding at *fol.* 712, 713).

The demand, sustained by the Referee, was thus for the cost of conversion which, as the Referee decided, the plaintiff had, prior to 26th October, 1894, been compelled to pay upon defendant's supposed default in paying the same when requested under the contract of February, 1893. That was, and is, the plaintiff's demand. And it was, without dispute, a demand merely for a recovery of money as due upon a covenant of the Lease. The present

question then is, Whether, when plaintiff brought its present suit on 6th March, 1900, it were the owner of *that* demand?

Now, the following facts are undisputed, and were found by the Referee:

On 1st August, 1894, plaintiff and the Traction Company, its sole stockholder (findings A-8, A-9 at *fols.* 537-539) by formal mortgage (in which plaintiff was called the "Heights Company"), mortgaged to the New York Guaranty & Indemnity Company, as security for a series of notes, various assets, and among them—

" IV:—All the right, title and interest of
" the Heights Company in and to the amount
" of the cost of all * * * additions, im-
" provements and equipments, heretofore and
" hereafter made, acquired and paid for by
" said Heights Company out of its own funds,
" for use in connection with the operations
" of the railroads of the Brooklyn City Rail-
" road Company * * * such cost, as
" aforesaid, being payable, under the terms
" of the Lease above mentioned by said
" Lessor Company, to said Lessee Company,
" in the event of the expiration of said
" Lease or other sooner termination thereof."

Finding 53 at *fols.* 391-393.

The words "the amount of the cost of * * *
" improvements * * * paid for by said Heights
" Company out of its own funds in connection with
" the operations of the railroads of the Brooklyn
" City Railroad Company" not only substantially,
but literally and precisely, describes the very thing
for which plaintiff has sued here to such extent of
\$1,115,400.71 accrued upon plaintiff's demand on 1st
August, 1894. And so the complaint describes the
moneys for which the entire judgment was sought
in almost the very same language, as follows:

" Prior to September 30, 1894, the plain-

“ tiff had expended out of its own funds
 “ more than two million dollars (\$2,000,000)
 “ in payment of the cost of converting the
 “ said railroads so demised * * * ” (Com-
 plaint, *fol.* 29).

And the words of the mortgage, thus aptly describing—and used by plaintiff in its own complaint to describe—the expenditures for the recovery of which this suit is brought, are shown by testimony given on plaintiff's behalf to have been *intended* to be used to describe these very expenditures, and no others. For the New York Guaranty & Indemnity Company, the trustee of the mortgage, and which was also the head of the syndicate to advance money thereunder (*fols.* 4269, 4422, 4423, 4882, 4884), employed Charles D. Phelps, a certified public accountant, to determine what moneys fell within the terms of the mortgage; and his report, dated 22nd June, 1894 (plaintiff's exhibits 1440 and 1440a, *fols.* 8011–8061), made to the New York Guaranty & Indemnity Company, showed a balance of conversion expenditure on 16th June, 1894, of \$1,059,154.55, which amount is, of course, included in the \$1,115,400.71 found by the Referee to have been expended on 1st August, 1894 (finding A-47 at *fol.* 599). Upon this report, thus fixing the amount expended by plaintiff out of its own funds, the New York Guaranty & Indemnity Company undertook the very loan to secure which the mortgage of these amounts was given (*fols.* 4423–4425).

The part of the \$1,875,000 not procured by the Guaranty & Indemnity Co. was obtained from the stockholders of the Long Island Traction Co. (*fols.* 4882, 5035); and these were also given clearly to understand that the amount mortgaged included the right to the very moneys for which plaintiff now sues. To secure subscriptions a circular was

issued to them which stated as follows (*fols.* 5042, 8773, 8784-8786):

“ Besides disbursing the moneys realized
 “ from the sale of the increased Capital
 “ Stock and of the Consolidated Bonds of
 “ the Brooklyn City Company, the Heights
 “ Company has expended out of its own
 “ funds a sum exceeding \$1,000,000 and
 “ will be required to spend before the elec-
 “ trical conversion is completed a large ad-
 “ ditional amount (*fols.* 8773, 8774).

* * * * *

“ To provide the moneys now needed as
 “ above stated the Long Island Traction
 “ and Brooklyn Heights Companies have
 “ created their 6% 1-3 Year Joint and Several
 “ Collateral Trust Notes to the par value of
 “ \$3,000,000 secured (*fol.* 8784).

* * * * *

“ (c) By a specific pledge of the cost value
 “ of all property, extensions, branches, ad-
 “ ditions, improvements and equipments
 “ constructed, made or furnished by the
 “ lessee out of its funds, the cost of which
 “ under the terms of the lease is to be paid
 “ for by the Brooklyn City Company on the
 “ termination of the lease, for any reason,
 “ which cost value, when the proceeds of the
 “ Collateral Trust Notes shall have been ex-
 “ pended under the terms of the lease and
 “ exclusive of any offset by the Brooklyn
 “ City Company, will, as estimated by
 “ the Brooklyn Heights Company exceed
 “ \$1,100,000 ” (*fols.* 8785, 8786).

The circular was dated at Brooklyn, September 15, 1894, and was signed by the Directors of the Long Island Traction Company, comprising: E. W. Bliss, Cornelius N. Hoagland, Felix Campbell, Silas B. Dutcher, John Englis, Crowell Hadden, Theodore F. Jackson, John G. Jenkins, Seth L. Keeney, Daniel F. Lewis, William Marshall, D. H. Valentine, Charles T. Young (*fol.* 8796).

There is consequently no doubt that these very expenditures and all plaintiff's right, title and interest in them were *intended* to be covered by the collateral trust mortgage of 1st August, 1894. The only question open to argument is whether the papers as executed carried out the intention.

The mortgage was foreclosed by suit against the plaintiff and the Traction Company; and a decree of foreclosure was therein duly made against them on 11th October, 1895. Under that decree, the mortgaged property, including Item IV specified and described as above, was, by deed of the special master of the Court made on 24th December, 1895, conveyed and assigned to one J. G. Jenkins for the consideration of \$5,500,000; and, on the same day, he, by deed, assigned it to a "reorganization committee," which, on 24th January, 1896, assigned it to the Brooklyn Rapid Transit Company. That company, by indenture of mortgage executed on 28th January, 1896, assigned Item IV to the Central Trust Company to secure an issue of bonds of the Rapid Transit Company. And to-day, so far as the record discloses, the latter company still owns the demand, if any there be, on Item IV subject to the lien of the Central Trust Company,—or, rather, legally speaking, the demand is owned by the Central Trust Company, subject to the Brooklyn Rapid Transit Company's equity of redemption.

Finding 78, at *fol.* 425.

Finding 79, at *fols.* 425–477, giving the full text of the foreclosure decree of 11th October, 1895.

Finding 80, at *fols.* 477, 478, finding the sale at foreclosure to J. G. Jenkins and the indenture executed by F. Kingsbury Curtis, Special Master, on 24th December, 1895, conveying and assigning to Jenkins for the price of \$5,500,000 all the mortgaged and pledged property, rights, etc. The

full text of such indenture is at *fols.* 8912-8920.

Finding 81 at *fols.* 478-479, finding the assignment on 24th December, 1895 of all such property to the Reorganization Committee, consisting of Messrs. Olcott, Flower, Brady, Jenkins, Young, Driggs and Pouch. The full text of such assignment is at *fols.* 8921-8932.

Finding 82 at *fol.* 479, finding the assignment on 24th January, 1896 by such Reorganization Committee, to the Brooklyn Rapid Transit Co. The full text of the instrument is at *fols.* 8933-8946.

Finding 83 at *fols.* 480-488, finding the mortgage by the Rapid Transit Company to the Central Trust Co. dated 1st October, 1895, but executed on 28th January, 1896, to secure bonds for \$7,000,000. The granting clause, the full text of which is given in the finding, includes the same property, rights, etc., so sold in foreclosure. The full text of the mortgage is at *fols.* 8991-9041.

On 24th March, 1896, long after the time when plaintiff's *entire* claim here in suit is claimed by plaintiff and decided by the Referee to have matured, an agreement was made between plaintiff and the Rapid Transit Company, the corporation which since 24th January, 1896, had, as already shown, held the title and ownership of the conversion cost pledged as Item IV to the Guaranty Company. Such agreement of March, 1896, recited an obligation of the plaintiff to the Rapid Transit Company arising out of the latter company's acquisition under foreclosure of the property so pledged, and out of the further fact that notes secured by the pledge to the Guaranty

Company the proceeds of which had been applied to plaintiff's railroad (including, of course, payment for all of the conversion for which defendant had not advanced the money) had been, in part, paid out of property of the Traction Company to whose rights the Rapid Transit Company had succeeded. The agreement then provided (*fols.* 501, 502) that—

“ The Heights Company shall continue to
 “ keep an accurate account of all expendi-
 “ tures for betterments and construction
 “ which are a proper charge against its
 “ lessor the Brooklyn City R. R. Co. * * *
 “ and shall also by proper entry on its
 “ books of account recognize the ownership
 “ of the Transit Company in said construc-
 “ tion account, so that in the event of any
 “ termination of said lease, the amount of
 “ said claim against the Brooklyn City R. R.
 “ Co. shall correctly appear and be readily
 “ ascertainable, and the equitable interest of
 “ the Transit Company therein shall appear
 “ upon the books of the Heights Company.”

Finding 84 giving the full text of such agreement at *fols.* 489–506.

Thereupon and on 20th April, 1896 (and so long before this present suit was dreamed of that, when the suit was begun, four years later, on the 16th March, 1900, the transaction seems to have been forgotten by those in charge of the suit), and in pursuance of the agreement of 24th March, 1896, and under the direction of plaintiff's counsel, Charles A. Collin, the Heights Company formally made an entry in its books crediting the Transit Company with \$2,237,897.35, with a statement that it

“ is the sum fixed and agreed upon as the
 “ total amount of the Construction and Bet-
 “ terment Account of the Brooklyn Heights

“ Railroad Company against the Brooklyn
“ City Railroad Company at the above-
“ named date ” (*fol.* 513).

Finding 86, at *fol.* 508–517, giving the
full text of the entry.

Such sum of \$2,237,897.35 includes, as the Referee expressly found, the very amounts of plaintiff’s expenditure making the principal sum of \$1,740,258.38 for which the judgment here appealed from was recovered by the Heights Company against defendant.

Finding A–68, at *fol.* 621.

Plaintiff’s own statement in its printed reply brief below, before the Referee (at p. 73), was as follows:

“ The total of \$2,237,897.35, referred to
“ on page 73 of the reply brief, and also in
“ the evidence of Mr. Forsdick, page 74 of
“ the reply brief, was the net total of construction expenditures of the plaintiff after
“ deducting all advances and credits.

“ Plaintiff has proven in this case that, of
“ this total, \$1,740,258.38 was due plaintiff
“ from the defendant on 1st September,
“ 1894, and that the remainder of approximately \$500,000, with about \$5,000 more
“ subsequently expended, is due plaintiff
“ from the defendant at the termination of
“ the lease.”

On 30th June, 1897, the plaintiff reported to the New York State Railroad Commissioners that the Rapid Transit Company was the owner of the equity in the sum of \$3,248,065.75 (increased to that sum since 1st January, 1896, from said \$2,237,897.35), “ B’klyn City R. R. Co. construction account payable by B. C. R. R. Co. at termination of lease.”

Finding 88, at *fol.* 518.

And on 30th June, 1898, a like report was made by plaintiff that the "Brooklyn Rapid Transit Co.'s equity in B. C. R. R. construction A/c, payable by B. C. R. R. at termination of lease," was the still further increased sum of \$4,030,120.86.

Finding A-21, at *fol.* 550, 551.

Now, as the sum of \$2,237,897.35 of construction, which plaintiff thus certified on 20th April, 1896, belonged to the Rapid Transit Company, included, as was so found, the very \$1,740,258.38, the principal sum for which plaintiff has recovered judgment, so the still larger sum of \$3,248,465.75 still of the same construction which plaintiff thus certified on 30th June, 1897, belonged to the Rapid Transit Company, of necessity also included the very same \$1,740,258.38 of principal recovered by plaintiff below.

Finding A-69, at *fol.* 622.

And so the still larger sum of \$4,030,120.86 still of the same construction cost, which plaintiff thus certified on 30th June, 1898, belonged to the Rapid Transit Company of necessity included the very same \$1,740,258.38 on principal recovered by plaintiff below.

Finding A-70, at *fol.* 622.

NOTE: In the Referee's absence plaintiff spread on the record a resolution of the Brooklyn Rapid Transit Company made in September, 1908, purporting to disclaim ownership of the cause of action and to "ratify" the action of the Heights Company in bringing the suit; but the Referee, in his report (*fol.* 751), sustained defendant's objection to the introduction of this paper (*fol.* 7504). It is, therefore, no part of the record upon which the decision below was made.

The Rapid Transit Company asserted its ownership of the claim. The Referee found (No. 83 at *fols.* 480-489) that in its \$7,000,000 mortgage to the Central Trust Company, as trustee, dated 1 Oct., 1895, but executed on 28th January, 1896, it expressly included Item IV as set forth above (p. 245). So the Referee found (Nos. 91, 92, 93 and 94 at *fols.* 520-524) that the Rapid Transit Company, in 1897, 1898 and 1901, upon applications to the Listing Committee of the New York Stock Exchange, affirmed its ownership of the Brooklyn City Railroad Company construction account.

POINT I. [*Fifth Principal Question.*]

The mortgage of 1st August, 1894, to the New York Guaranty & Indemnity Company and the sale in the foreclosure absolutely divested the plaintiff of all title and interest in its present alleged cause of action to the extent of \$1,115,-400.71 of the principal thereof.

The relevant description in the mortgage, in the foreclosure decree and in the assignment to John G. Jenkins by the Master under the decree, was in the words already quoted as follows (finding 53, at *fols.* 391-393):

“IV.—All the right, title and interest of
 “the Heights Company in and to the amount
 “of the cost of * * * additions, im-
 “provements and equipments, heretofore and
 “hereafter made, acquired and paid for by
 “said Heights Company out of its own
 “funds, for use in connection with the opera-
 “tions of the railroads of the Brooklyn City
 “Railroad Company * * * such cost,

“asaforesaid, being payable, under the terms
 “of the Lease above mentioned by said
 “Lessor Company, to said Lessee Company
 “in the event of the expiration of said Lease
 “or other sooner termination thereof.”

What words could more certainly describe plaintiff's cause of action as it existed on 1st August, 1894, the date of the mortgage? The cause of action recovered on below without any doubt whatsoever, was for “the amount of the cost of * * * “additions, improvements and equipments” theretofore made, acquired and paid for by said Heights Company *out of its own funds* for use in connection with the operations of the railroads of the Brooklyn City Railroad Company. These words state plaintiff's claim presented by its complaint and sustained by the Referee. And such cost was—and without any doubt whatsoever—“payable, under “the terms of the Lease * * * to said Lessee “company, in the event of the expiration of said “Lease or other sooner termination thereof.” The words simply state the effect of Article X of the Lease at *fol.* 78, 79, as follows :

“X.—The lessor further covenants and
 “agrees that in the event of the expiration
 “of this lease, or other sooner termination
 “thereof, it will pay to the lessee the actual
 “*cost of all* property, extensions, branches,
 “*additions, improvements and equipments,*
 “*made, acquired and paid for by said lessee*
 “*out of its own funds for use in connection*
 “*with the operations of the railroads of the*
 “*lessor,* less the cost of such part thereof as
 “was required to preserve said railroads,
 “extensions, additions, improvements and
 “equipments in good repair and serviceable
 “condition, and less the cost of such part
 “thereof as was necessary to preserve and
 “secure efficiency in the operation of said
 “railroad.”

The Court will observe that this article neither makes nor suggests any distinction between plaintiff's payments of such cost which might be necessitated by default of defendant (if ever there should be such default) and those which should not have been so necessitated. Defendant's obligation was to repay at the end of the lease the actual cost paid under any circumstances by plaintiff for such "additions, improvements and equipments." If defendant ought to have made such repayment before the end of the Lease but had not done so, none the less (but rather the more) would it then be bound to make the repayment.

Plaintiff's sole argument before the Referee against this affirmative defense rested upon the words in the description of the item as follows :

"such cost, as aforesaid, being payable,
"under the terms of the Lease above mentioned by said Lessor Company, to said Lessee Company, in the event of the expiration of said Lease or sooner termination thereof" (*fol.* 392, 393).

It was contended below that those words were not apt to describe the conversion cost payments the amount of which it seeks here to recover; that, under the Lease of 14th February, 1893, the only cost repayable by the lessor company at the "expiration of the lease or sooner termination thereof" was, under Article X of that instrument, the

"cost of all property, extensions, branches,
"additions, improvements and equipments,
"* * * paid for by said lessee out of its
"own funds * * * (*fol.* 78)."

and that such words did not include cost of improvement, &c., which, under the Lease, ought to have been paid for by the lessor, but had not been, and, in fact, had been "paid for by said lessee out of its own funds."

The argument was unsound ; for such added words were not words limiting the preceding description of Item IV as it was pledged. The cost involved in this suit *had* been, in the words of the mortgage to the Guaranty Company, whether read literally or according to their substance, "paid for by said " Heights Company out of its own funds," and "for " use in connection " with Brooklyn City Railroad operations ; and the Heights *would be* entitled to require repayment from the Brooklyn City at the expiration of the Lease. That would be none the less the case, even if plaintiff's present allegations and claims were true, and it were, therefore, also entitled to require repayment at once. There never was any intent on plaintiff's part—very certainly no such intention is shown—to reserve from the pledge to the Guaranty Company, as security for noteholders, any part whatever of the cost actually paid for by plaintiff, whether recoverable by plaintiff from defendant under Article X of the Lease or recoverable from defendant earlier or forthwith.

The text of the mortgage permits no doubt. But if, on its face, there could be doubt, then the question, as in the interpretation of every written instrument, must turn upon the intention of the parties. What, therefore, *was* the "cost" which plaintiff meant to pledge and mortgage to the Guaranty Company? Upon plaintiff's own contention in this case doubt about that would seem to be impossible. To the extent of plaintiff's payments for conversion down to August 1st, 1894, which was the date of the mortgage to the Guaranty Company, it was not the intention—that is to say, not in the mind—of anyone at that time that any of those payments were not within the very payments claimed to be recoverable from defendant under Article X of the Lease. For, according to one of plaintiff's fundamental contentions in the case, it was not at that time in the mind of any one of the directors or

officers of plaintiff who took part in the transaction with the Guaranty Company, or at the time of the authorization of the mortgage to the Guaranty Company, that there existed then, and outside of Article X, any claim against the Brooklyn City by reason of the latter's breach of the Lease.

Plaintiff's officers and directors who authorized and executed the Tripartite Agreement were substantially the very officers and directors who executed the mortgage to the Guaranty Company (findings A-15, A-17, at *fols.* 543-545, 546-548). The mortgage was dated 1st August, 1894, and the Tripartite Agreement on 17th August, 1894—that is to say, they were in effect contemporaneous papers. The Tripartite Agreement recited the mortgage and provided for the disposition of the notes to be issued under it (agreement, *fols.* 206-208, 210-217). Whether rightly or wrongly, the position to which, by the Tripartite Agreement, those who were then the directors and officers of the plaintiff (and even if the Tripartite Agreement were voidable) *meant* to commit defendant, and the position held by themselves, was that defendant had at that time more than paid the conversion cost due from it under the Lease of 14th February. That is to say, that what plaintiff had itself then advanced for cost of conversion, or might thereafter advance for such cost, was not an advance which defendant had been, or would be, presently liable to repay, but was an advance from the funds of the plaintiff itself, which, under Article X of the Lease, would be payable by plaintiff to defendant at the termination of the Lease.

Since then, all the directors and officers of plaintiff who authorized or executed plaintiff's pledge to the Guaranty Company, then meant and intended (even if wrongfully inspired by their adverse interest as stockholders in the Brooklyn City Company) to make no claim of a breach by the Brook-

lyn City of its obligation, on plaintiff's request, to make expenditure for electrification up to a certain maximum limit—since defendant had made no request for expenditure beyond what defendant had made—since defendant's directors and officers all meant and intended to treat the plaintiff's expenditure for which this suit is brought, as expenditure under Article X of the Lease, is it not obvious that they likewise intended and meant to include in the mortgage to the Guaranty Company plaintiff's expenditure down to 1st August, 1894, being the very expenditure now sued for? If not, they must have intended a cheat upon the Guaranty Company and the persons who should subscribe for their notes relying upon the pledge. Plaintiff itself said at p. 27 of its printed brief below that

“ the plaintiff seems to have made no
 “ claim whatever in 1894 that anything was
 “ ever due it under the lease.”

How plainly unreasonable it would be to suppose that, when the mortgage to the Guaranty Company expressly included (mortgage, *fol.* 390, 391), plaintiff's entire capital stock (owned by the Traction Company which joined in the mortgage), and

“ All net profits of or in anywise derived or
 “ receivable by said Heights Company, as
 “ Lessee as aforesaid of the railroad or other
 “ property of The Brooklyn City Railroad
 “ Company * * * ”

and further included (*fol.* 391)—

“ all the right, title and interest of the
 “ Heights Company in and to the amount of
 “ the cost of all property * * * im-
 “ provements and equipments heretofore and
 “ hereafter * * * paid for by said

“ Heights Company out of its own funds,
“ for use in connection with the operations
“ of the railroads of The Brooklyn City Rail-
“ road Company * * * ”

and when the Heights Company, the plaintiff, as it now itself insists in this very suit, had, at that time, in fact paid “out of its own funds” the cost of improvements which it now seeks to recover from defendant—how plainly unreasonable, we say, it would be to suppose that the Heights Company meant—or *meant the Guaranty Company or the creditors to understand that it meant*—to withhold from the mortgage such part of the cost as it had the right at that very time, and without waiting for the lease to terminate, to recover from defendant.

If the cause of action were valid, can there be the slightest doubt of the right of the Guaranty Company, or of those claiming under the mortgage-assignment to have sued the defendant, if and when the discovery had been made that the right or interest in conversion cost assigned to the Guaranty Company by the plaintiff, did in truth, include the right to recover from defendant \$1,740,258.38 of such cost? If the truth were otherwise, what is to be said of the honesty of the plaintiff's transactions with those who loaned it money upon the security of the pledge to the Guaranty Company?

But conclusive evidence against plaintiff's contention is found in the report of Phelps, the neutral accountant, and the testimony of its own witness, Alfred A. Noble. In the Phelps report there appeared as a statement of the amount of plaintiff's “Accounts Receivable” the sum of \$46,941.88 (*fol.* 8017), which, of course, did not include the amount of plaintiff's conversion expenditures; and yet if this amount had been deemed to be presently payable it would have come within the category of accounts receivable. Furthermore, Mr. Noble testi-

fied that it was this very report of Mr. Phelps, made after inspecting the books both of the Brooklyn Heights and Brooklyn City Companies, which was employed in coming to the conclusion of the Tripartite Agreement (*fols.* 4422-4424). So that there can be no doubt that the words relied on by plaintiff were thought by the neutral accountant, by the party advancing the money and by plaintiff itself correctly to describe the legal status of the fund mortgaged. Plaintiff now claims that they do not furnish a correct description; but it cannot contest the fact that, whether they be or not properly descriptive of these sums expended by it, they were at any rate employed for the purpose of describing these sums, and, therefore, these were the sums actually covered by the mortgage. Indeed, plaintiff's argument proves too much; for, if none of this \$1,059,154.55 was covered by the mortgage, then there was absolutely no other property or thing to which the words of Item IV in the mortgage applied, and the plaintiff is reduced to the grotesque claim that the New York Guaranty & Indemnity Company and its associates advanced over one million of dollars (*fols.* 4425, 4882, 5033-5035) upon the faith in some part at least, of mere empty phrases referring to neither any property nor any value then in existence.

And if, after all this, there were any doubt that the words of Item IV in the mortgage meant what they said, then through the assurance contemporaneously given by plaintiff to the subscribers for the notes, which we have quoted (*supra*, p. 246) the doubt would be ended.

It is a primary rule of construction that words are to be construed in the sense that the person to whom they were addressed was given reason to believe that they were meant.

White v. Hoyt, 73 N. Y., 505, by ALLEN, J., at p. 511:

“The rule in ethics is that ‘when the terms

“ ‘ of a promise admit of more senses than
“ ‘ one, the promise is to be performed in that
“ ‘ sense in which the promisor apprehended
“ ‘ at the time the promisee received it,’ and
“ this is the established rule at law, as well
“ as in morals. In the language of the books,
“ it is to be interpreted in the sense in which
“ the promisor had reason to suppose it was
“ understood by the promisee (*Hoffman v.*
“ *Ætna F. Ins. Co.*, *supra* [32 N. Y., 405];
“ *Johnson v. Hathorn*, 2 Abb. Ct. of App.
“ Dec., 465; *Barlow v. Scott*, 24 N. Y., 40;
“ *Mowatt v. Lord Londesborough*, 3 E. &
“ B., 307; *Potter v. Ontario Ins. Co.*, 5
“ Hill, 147).”

Hamer v. Sidway, 124 N. Y., 538, by PARKER,
J., at p. 550 :

“ It is essential that the letter interpreted
“ in the light of surrounding circumstances
“ must show an intention on the part of the
“ the uncle to become a trustee before he
“ will be held to have become such; but in
“ an effort to ascertain the construction
“ which should be given to it, we are also to
“ observe the rule that the language of the
“ promisor is to be interpreted in the sense
“ in which he had reason to suppose it was
“ understood by the promisee (*White v.*
“ *Hoyt*, 73 N. Y., 505, 511).”

Gillet v. Bank of America, 160 N. Y., 549, by
MARTIN, J., at p. 555 :

“ Where a doubt exists as to the meaning
“ of words, resort may be had to the sur-
“ rounding facts and circumstances to de-
“ termine the meaning intended. If the
“ language of a promise may be understood
“ in more senses than one, it is to be in-
“ terpreted in the sense in which the prom-
“ isor had reason to believe it was under-
“ stood (*White v. Hoyt*, 73 N. Y., 505).”

Stanton v. Erie Railroad Co., 131 App.
Div., 879, by JENKS, J., at pp. 882, 883.

POINT II. [*Fifth Principal Question.*]

The Referee himself expressly refused to find that plaintiff had “never encumbered the cause of action set forth in the complaint or any part thereof.”

Plaintiff's request LV, at fol. 709.

But if the cause of action were—as the Referee thus plainly supposed it was—encumbered by the mortgage to the Guaranty Company, how, when, where, did it escape from the encumbrance before everything subject to the encumbrance was divested out of plaintiff and vested in John G. Jenkins and finally in the Brooklyn Rapid Transit Company. On what theory could the Referee in the very finding just quoted conclude that plaintiff “is now the owner” of the cause of action?

And even the “encumbrance” of a cause of action, as of any personal property, takes title out of the mortgagor, who has only an equity of redemption.

Jones on Chattel Mortgages, sec. 4:

“In like manner an assignment of a mortgage, of a policy of insurance, or of any chose in action, as security, may be either a pledge or a mortgage, according to the intent of the parties. Whether it be one or the other, the purpose of the instrument is the same,—to secure the payment of money or the performance of some act by the maker of the instrument, or by some one else, for whom he undertakes. The importance of determining whether the transaction be a pledge or a mortgage arises from consequences resulting from the instrument being the one or the other; the title to the property in the former case remaining in the debtor both before and

“ after breach of the condition; and in the
“ latter case the title being all the while in
“ the creditor, and becoming absolute in him
“ at law after the debtor's default.”

Parshall v. Egbert, 54 N. Y., 18, by JOHNSON, C.,
at page 23 :

“ A chattel mortgage is a present transfer
“ of the title to the property mortgaged,
“ subject to be defeated on payment of the
“ sum or instrument it is given to secure.”

POINT III. [*Fifth Principal Question.*]

The contract of March, 1896, between plaintiff and the Brooklyn Rapid Transit Company, and the book entry made on 20th April, 1896, in execution of that contract, divested plaintiff of all then remaining ownership, if any there were, in its entire supposed cause of action and vested the same in the Brooklyn Rapid Transit Co.

The contract of March, 1896, had, as one of its primary purposes, to adjust and witness by definite written entry in plaintiff's books where was such ownership. The entry was made, as we have shown (*supra*, p. 250), in precise accordance with the agreement, and of itself directly, and not merely by estoppel, effectuated a transfer by plaintiff to the Transit Company of plaintiff's entire remaining interest in the claim.

POINT IV. [*Fifth Principal Question.*]

Plaintiff's own official sworn statements in 1897 and 1898 to the Railroad Commission that the entire amount of its cause of action was owned by the Brooklyn Transit Company are decisive.

Such reports were not made by directors who had any interest in the defendant company. The reports were both made after the change of ownership and control of the plaintiff company in January, 1896. And they affirmed beyond any possible doubt the legal result of the foreclosure sale and the Master's sale thereunder already set forth by us, and of the entry of April, 1896, made under the agreement of March, 1896 (findings 88 at fol. 518; A-21 at fols. 550, 551). And we ask the Court's attention to the fact that the statute under which these reports were made did not lay the obligation of making them upon particular officials, but required them to be corporate acts (L. 1882, ch. 353, § 10).

We confess that, with such study as we have given to the elaborate record in this case, we are unable to understand what contention is available to the plaintiff to assert its ownership of its supposed cause of action in March, 1900.

POINT V. [*Fifth Principal Question.*]

This defense does no injustice to plaintiff.

The price of \$5,500,000 for which the sale on foreclosure was made obviously included the value, as estimated, of plaintiff's supposed cause of action at the date of the sale, that is to say, on 24th De-

ember, 1895. There was plainly a large surplus on the sale. Besides the legal costs of foreclosure the only payments to be made from the proceeds were these :

Receiver's certificates.....	\$430,000.00
Interest thereon (<i>fol.</i> 8887).....	5,492.07

\$435,492.07

Interest on such certs. and int. from 1st July, 1895, <i>say</i>	12,500.00
Notes sold outright (<i>fol.</i> 8879)	\$1,875,000
Interest to 1 Aug., 1895 (<i>fol.</i> 8879).....	56,250

1,931.250.00

Interest on such notes from 1st Aug., 1895, <i>say</i>	45,000.00
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Amount due on loan by Brooklyn City Railroad Company as security for which \$898,462.69 par value of said notes were pledged (<i>decree, fol.</i> 8868). Such loan was unpaid to the amount of \$606,462.32 (<i>fol.</i> 3944) and was made on August 15th to November 9th, 1894 (<i>fols.</i> 8731, 8739, 8746) and with unpaid interest to 24th December, 1895, would not exceed.....	620,000.00
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Making total amount to be paid from proceeds besides expenses of fore- closure not more than.....	\$3,044,242.07
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The \$2,450,000 surplus from the sale was with plaintiff's acquiescence distributed in cash among the stockholders of the Long Island Traction Company (*fol.* 5093)—the persons who, through that company's ownership of all of plaintiff's capital stock, were the only ones beneficially interested in the plaintiff corporation. So that a large part of the \$5,500,000, including the price for plaintiff's

present supposed cause of action, went, not only to pay off the obligations of \$1,875,000 and interest due plaintiff's outside creditors—thus relieving plaintiff to that extent and to that extent securing plaintiff the benefit of the sale (the Receiver's certificates representing expense incurred upon its railroads for plaintiff),—but also went directly to plaintiff and its beneficial owners as surplus in pocket.

Plaintiff in suing here is, therefore, plainly seeking to recover for something which it has already sold, and for which it—and also the corporation then owning all of its stock, and the stockholders of that corporation—has received the price.

SIXTH PRINCIPAL QUESTION.

The Referee's deduction of the amount of the \$308,340.35 note from the amount of defendant's conceded payments for cost of conversion after 6th June, 1893.

This note was given in pursuance of the express requirement of the Tripartite Agreement of 17th August, 1893, as representing defendant's overpayment on conversion; and in pursuance of the Agreement the note was signed by both plaintiff and the Traction Company as makers, the Traction Company then being the owner of plaintiff's entire stock.

Agreement, *fol.* 205, 206, 212-215.

The note was dated 15th August, 1894. It was paid for plaintiff by Flower & Company on 25th June, 1895 (finding A-19 at *fol.* 549). The judgment awarded by the Referee includes the amount of the note, \$308,340.35, and interest, over and above the amount awarded for defendant's supposed default in spending \$6,000,000 on conversion under Art. V of the Lease, the latter being the only default of defendant for which this suit is brought (complaint, *fol.* 26-32).

We shall, in the next chapter of this brief (*Seventh Principal Question*), discuss the merits of the adjustment of August, 1894, embodied in the Tripartite Agreement, including the truth and correctness of the computation made at that time which showed plaintiff to be in debt to defendant in the sum of \$308,340.35. We shall there contend that, even if the Tripartite Agreement should be set aside or ignored because plaintiff's directors who authorized it held stock in the defendant Company, nevertheless the Referee ought himself,

upon the undisputed facts of this case, to have concluded that the agreement was right in itself, and a bar to plaintiff's claim, not only legally sufficient, but just and meritorious. In this present chapter of our argument, however, we undertake to show that, even if the computation embodied in the Tripartite Agreement were entirely erroneous, and the agreement itself properly avoided, none the less the Referee was in error to give in this suit the relief which he did with respect to the \$308,340.35 note. For, in effect, he has in this suit rendered a judgment in plaintiff's favor and against defendant for the amount of the note with interest, and has himself levied an effectual execution upon such constructive judgment by deducting the amount of the note and interest from the conceded amount of defendant's actual payments for conversion done after 6th June, 1893.

Exceptions Specially Presenting the Question.

The present question is specifically presented by defendant's exception at *fol.* 781-783 to the Referee's finding XXXIX at *fol.* 694-697, made on plaintiff's request; by the exception at *fol.* 767, 768, to the Referee's Sixth Conclusion of Law at *fol.* 744, 745 including his direction for judgment; by the exception at *fol.* 797 to the Referee's refusal to find defendant's request 47 at *fol.* 382, 383; and by the exception at *fol.* 816 to his refusal to find defendant's request A-62 at *fol.* 618, 619.

Facts. [*Sixth Principal Question.*]

We have here again to remind the Court that plaintiff's cause of action sued and recovered upon was for defendant's alleged default in expending the full sum of \$6,000,000 for cost of conversion

done after 6th June, 1893. No other cause of action was alleged in the complaint or presented on the trial; nor was any amendment of the complaint sought in this respect. The Referee found (finding for plaintiff, XXXVIII, at *fols.* 692-694) that—

“ on and after June 6th, 1893, defendant
“ paid out on account of the construction
“ and conversion of its railroad * * *
“ making the gross total of the aforesaid
“ payments and advances, \$4,626,751.27.”

Neither in the Decision nor in any of the findings is it stated or suggested that defendant did not—for actual conversion work after 6th June, 1893, when the Lease “took effect” by delivery of possession of the property to plaintiff—make such expenditure, dollar for dollar, of \$4,626,751.27. It would certainly seem that the only conclusion which, on plaintiff’s complaint and the theory of its action, could be drawn from that fact, is that plaintiff should recover against defendant the principal sum of \$1,373,248.73 (being the \$6,000,000 less the \$4,626,751.27) and no more, instead of the principal sum of \$1,740,258.38 which in fact it did recover. The explanation sought to be made of this discrepancy is in Finding XXXIX made for plaintiff at *fols.* 694-697, where the learned Referee found that—

“ On August 15th, 1894, plaintiff with-
“ out consideration executed and delivered
“ to defendant plaintiff’s note for \$308,340.35
“ which was afterwards paid by plaintiff to
“ defendant, together with interest to the
“ amount of \$16,136.36 * * * After
“ June 6th, 1893, at the request of defend-
“ ant, plaintiff paid and discharged certain
“ liabilities of the defendant incurred prior to
“ June 6th, 1893, by defendant in the opera-
“ tion of its railroads to the aggregate
“ amount of \$42,532.84. The total amount
“ so repaid by plaintiff to defendant was

“ \$367,009.65. The gross advances by de-
“ fendant as aforesaid were \$4,626,751.27.
“ The difference between said amounts con-
“ stituted the total net advances by defend-
“ ant to plaintiff on account of construction
“ and conversion * * * accrued after
“ June 6th, 1893, and is the sum of \$4,259,
“ 741.62.”

The principal recovery below was for the difference between the last sum of \$4,259,741.62 and \$6,000,000, that is to say, for \$1,740,258.38. The only support which, so far as we understand, the plaintiff claims to produce for the Referee's conclusion is the statement, not yet quoted, in such Finding XXXIX, that—

“ defendant credited this note to its con-
“ struction account as an amount which
“ lessened by that much the amount of the
“ expenditures of plaintiff advanced by de-
“ fendant to plaintiff in repayment (*sic*) in
“ the conversion of the demised railroads, and
“ plaintiff charged the amount of this note
“ to its construction account as an expendi-
“ ture by it in the conversion and construc-
“ tion of the demised premises” (*fols.* 695,
696).

Before the \$308,340.35 note was given, or any entry made with respect to it, the defendant had already charged against construction nearly \$2,000,000, which, as plaintiff claimed below with the Referee's approval, were not justifiably charged. It had charged the \$1,481,057.58 expended for conversion work done between 14th February and 6th June, 1893, as fully set forth in our discussion of the *First Principal Question* (*supra*, p. 71). It had charged the items of the “Journal Entries” aggregating nearly \$700,000, which are to be fully discussed in the next succeeding chapter of this brief. Indeed, before receiving the \$308,340.35 note from

plaintiff and the Traction Company, defendant had charged—but wrongfully, as plaintiff claimed below—the very items—and all of them—which produced the result of an apparent draft from defendant's surplus of the very sum of \$308,340.35 for which the note was given. These debits to construction are shown in Plaintiff's Exhibit 1448 at *fol.* 8217–8290, 8405–8498, 8524–8535, 8553–8564; and their making upon defendant's books is conceded by the stipulation *fol.* 1232–1243.

Why, then, should not defendant, when it received the note which, if paid, would return to defendant what it claimed to be its over-payment for conversion, credit the note to the same construction account? And in doing so, what right, of any imaginable kind, did its making such entry give to plaintiff, for the purposes of this present suit in which plaintiff itself repudiates, and thus far successfully, a far larger amount of former and corresponding debits by defendant to the very same construction account?

The Referee was in error when he found that such credit was made—

“as an amount which lessened by that
“much the amount of the expenditure ad-
“vanced by defendant to plaintiff.”

The testimony shows, as the Court will see if it will be at the pains to examine the synopsis of the book-keeping testimony which we give in the note hereunder,* that the credit of the amount of the note

* The evidence upon this subject is found in defendant's Ledger No. 1, in evidence as defendant's exhibit 1402 (*fol.* 6848), and of which page 246 was read in evidence by plaintiff and is printed as plaintiff's evidence at *fol.* 1115–1120. From this book it appears that advances made in lump sums by defendant to plaintiff for use in conversion (as distinguished from the \$1,084,435.58 expended directly by defendant in payment of plaintiff's payrolls [Finding XXXVIII at *fol.* 693 : defendant's exhibit 1466, p. 3185, vol. 8]), were charged upon defendant's books to a suspense account known as “Brooklyn Heights R. R. Construction.” As reports were made by plaintiff of the purposes to which

in defendant's construction account was no more made, as lessening the amount of defendant's advances to plaintiff for conversion, than it was made as lessening all of defendant's expenditure for conversion. The simple and normal fact was that defendant, as against its expenditure of all sorts made for conversion, whether by advances to plaintiff or otherwise—all of such expenditure appearing in some form as debits to construction—had entered on the other side of the ledger all receipts for conversion, of every sort whatsoever, whether repayments by plaintiff or otherwise.

Nor is it easy to understand what right, or advantage of any kind, in this suit, plaintiff gets because of the manner in which it chose to enter in its own books the \$308,340.35 note at the time it was made by itself and the Traction Company.

these moneys so advanced to it had been devoted, corresponding charges were made to defendant's capital accounts under the appropriate heads of "Construction," "Real Estate" and "Equipment," and the "Brooklyn Heights R. R. Construction" account was credited with these amounts. Of a total of \$3,213,049.43 advances made to plaintiff (Finding XXXVIII for plaintiff at *fol.* 694), there had, on 30th June, 1894, been charged out to the proper construction accounts all but \$469,279 79, leaving that sum as the balance in the suspense account (*fol.* 1120). This balance was, by subsequent charges (not appearing in plaintiff's evidence, but to which we may refer by stipulation [*fol.* 9647]), increased to \$511,367.83. When the note for \$308,340.35 was given, this sum was credited against such balance and charged not to any capital account, but to defendant's account of its "Accounts Receivable" (*fol.* 1120). Defendant's books are therefore entirely inconsistent with any such action as the Referee took, and entirely consistent with the calculation made between the parties and embodied in the Tripartite Agreement, whereby it was determined that defendant had expended \$308,340.35 from its surplus. The moneys which had been so expended were, as we have seen, charged preliminarily in the "Brooklyn Heights R. R. Construction Account," of which \$511,367.83 remained undistributed. When the note was given to make up the deficiency disclosed by the calculation on the "Yellow Sheet" the \$308,340.35 included in the undistributed balance of \$511,367.83 could be returned to an account applicable to the surplus, and was in fact returned to "Accounts Receivable" (*fol.* 1120), while the amount then remaining, \$203,027.48, was, as the extract from defendant's books printed at *fol.* 6910 shows, attributed to expenditures on account of capital. The amount of the note was, therefore, never really credited to any capital account, but only to the suspense account known as "Brooklyn Heights R. R. Construction," because the moneys charged therein had been paid to plaintiff for construction,

For plaintiff condemns and repudiates the proposition that the note was given to represent expenditure by plaintiff in conversion. On the contrary, the plaintiff claims, and the Referee has found, that the note was given "without consideration." The part of Finding XXXIX, which states the bookkeeping treatment of the note by plaintiff and defendant, was no doubt intended by the Referee and the plaintiff to amplify their assertion that the note was given "without consideration." But that fact we shall, for the present chapter of this argument, assume to be true, reserving until the next chapter our demonstration of the fact that there was full consideration for the note—dollar for dollar.

UPON THE LAW.

POINT I. [*Sixth Principal Question.*]

It was error to deduct from defendant's undisputed expenditure for conversion the amount and interest of the \$308,340.35, whether or not the note were given "without consideration" by authority of directors holding shares of defendant's stock.

This would seem to be a legal *res ipsa loquitur*. The facts having been stated, the argument is made. The complaint, whether in the form or the substance of its pleading, sets forth, as we have said, one and only one cause of action, which rested upon defendant's alleged default in expending \$6,000,000 for conversion under Art. V of the Lease. The Referee's finding, made in plaintiff's favor and upon plaintiff's own request, to the effect that defendant had so expended \$4,626,751.27—that is to say, that plaintiff had upon its

alleged cause of action, an available claim for not more than \$1,373,248.73—surely answers the plaintiff's claim and the Referee's other finding, that plaintiff's valid claim in this action is greater than \$1,373,248.73 by the sum of \$308,340.35 and interest. In thus increasing the plaintiff's recovery, the Referee did nothing less than award plaintiff a recovery to the extent of the \$308,340.35 and interest on an entirely separate and distinct cause of action which had not been pleaded or sought to be pleaded in this suit. And this new cause of action was first presented or mooted, so far as the record discloses, when in 1903 (*fols.* 1069, 1138), plaintiff produced before the Referee a statement of the recovery which it claimed in this suit (*fols.* 7687-7692)—that is to say, eight years after the cause of action is said to have arisen, after several of those who carried through the transactions were dead, and after the memory of those of them still living must have grown less distinct and certain. If ever there were a case, this is one, for applying the rule so often applied by appellate courts and already cited (*supra*, pp. 215-219) that a judgment must be reversed which has been recovered upon a cause of action not within the scope of the case presented by the complaint.

Stephens v. Meriden Co., 160 N. Y., 178,
quoted from *supra*, p. 215.

Gilroy v. Everson-Hickok Co., 118 App.
Div., 733; *aff'd* 190 N. Y., 551.

Hall v. La France Fire Engine Co.,
158 N. Y., 570.

Brightson v. Claflin Co., 180 N. Y., 76. By
O'BRIEN, J., at p. 81:

“ Plaintiff pleaded a written contract for
“ five years, and he recovered for a breach

“ of a contract implied by law for one year.
 “ We think that the plaintiff did not re-
 “ cover *secundum allegata et probata* * * *
 “ It is a fundamental rule that a judgment
 “ shall be *secundum allegata et probata*, and
 “ that any departure from that rule is cer-
 “ tain to produce surprise, confusion and
 “ injustice.”

Reed v. McConnell, 133 N. Y., 425. By ANDREWS,
 J., at p. 434 :

“ The rule that a party coming into court
 “ asserting one cause of action cannot re-
 “ cover on another and different one is un-
 “ changed. It is essential to the orderly
 “ administration of justice and the protec-
 “ tion of the rights of litigants. Lawyers
 “ could never safely advise their clients, and
 “ parties would frequently be misled if any
 “ other rule was admitted.”

POINT II. [*Sixth Principal Question.*]

It was no valid reason for making the present action a process to adjudicate a cause of action on the note which was not within the scope of the suit, that the judicial investigation of the question, whether the note were “without consideration,” might involve some of the facts or call for some of the testimony relevant to the cause of action which was pleaded.

This proposition also makes its own argument—so much so, indeed, that it is not easy to find many authorities dealing with the question. But there are some.

Southwick v. First National Bank of Memphis, 84 N. Y., 420. The defendant bank had credited to a depositor a draft upon plaintiff, which was later accepted and paid by plaintiff. Plaintiff had permitted the depositor to draw upon him only to provide funds with which to meet another draft held by plaintiff against the depositor. Defendant,

however, refused to apply these funds to the payment of such draft held against the depositor; and the action was brought against it for a wrongful conversion of the proceeds of the draft accepted by plaintiff—the allegation being that it knew of the arrangement between plaintiff and its depositor that such proceeds should be devoted to the payment of the draft held by plaintiff. The action was therefore brought for breach of its implied contract to devote such proceeds to the payment of that draft. Upon the trial all of these facts were made out except knowledge of the bank of the arrangement between plaintiff and the depositor; and the plaintiff was permitted to recover as for money paid by mistake. It was held that this ground of action, although involved in the same facts and sustained by the same testimony brought forward to prove the cause of action pleaded, could not be enforced in that action, and that the judgment should be reversed. By EARL, J., at p. 429 :

“ Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary.”

* * * * *

“ It is no answer to this objection that the defendant was probably not misled in its defense. A defendant may learn outside of the complaint what he is sued for and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him. Yet it is his right to have a complaint, to learn from that what he is sued for and to insist that that shall state the cause of action which he is called upon to answer; and,

“ when a plaintiff fails to establish the cause
 “ of action alleged, the defendant is not to be
 “ deprived of his objection to a recovery by
 “ any assumption or upon any speculation
 “ that he has not been injured.”

Gordon v. Ellenville & Kingston R. R. Co., 195 N. Y., 137 : The defendant had built its roadbed over a dry canal through which mountain streams passed in times of freshet. Through the building of the roadbed the outlet was narrowed; and in a severe storm the water was backed over plaintiff's land. An action was brought as for trespass. It was held that recovery could not be had on the theory that the defendant was negligent in constructing its roadbed so that the outlet was improperly narrowed ; and the judgment below was reversed. By WERNER, J., at p. 140:

“ The complaint was not framed upon the
 “ theory of defendant's negligence, but solely
 “ upon the ground of its wrongful and un-
 “ lawful invasion of the plaintiff's lands.
 “ This is not an immaterial or technical
 “ variance in pleading which, under the
 “ liberal rules of the Code, may be disre-
 “ garded in the interests of justice. It in-
 “ volves a substantial distinction based upon
 “ well defined legal principles which cannot
 “ be ignored.”

POINT III. [*Sixth Principal Question.*]

In a suit to set aside the note and to recover back the amount paid on it, the Long Island Traction Company, one of its makers, would have been a necessary party.

This proposition has been already argued (*supra*, pp. 204, 205) when we dealt with the Tripartite Agreement, upon the following authorities there cited:

Osterhoudt v. Board of Supervisors
 98 N. Y., 239, 244.

278 VI. Deduction of \$308,340.35 on note from def't's conceded expenditure.

Steinbach v. Prudential Ins. Co., 172 N. Y., 471.

Metropolitan Co. v. Manhattan Co., 11 Daly, 373, 436.

POINT IV. [*Sixth Principal Question.*]

An adjudication against the validity of the \$308,340.35 note can be made only through the avoidance of the Tripartite Agreement. The reasons already given which forbid such avoidance in this suit also forbid plaintiff's recovery upon the note.

The reasons are given in the discussion of the law upon the Tripartite Agreement (*supra*, pp. 147-212). The note did represent an accord and satisfaction or binding adjustment between the parties. The note was voluntarily given by the plaintiff whose directors had no such adverse interest as to justify the avoidance of the note and the recovery back of the amount paid on it. The note was made with the approval of the Long Island Traction Company, the owner of all the shares of plaintiff's stock—the Traction Company itself being a maker of the note with the plaintiff. The lapse of time and plaintiff's acceptance of the benefits of the instrument under which the note was given should effectually forbid plaintiff to avoid the note.

SEVENTH PRINCIPAL QUESTION.

The original and intrinsic fairness of the adjustment by the Tripartite Agreement. The merits of the \$308,340.35 note and of the "journal entries."

The Referee, as has been seen, decided this case upon his ruling that, as against the \$6,000,000 which might be required from defendant under Art. V of the Lease, defendant should have no credit except for payments for conversion done after 6th June, 1893, when possession was taken under the Lease. And this ruling was not always applied where it operated in defendant's favor; for, as we have just shown, the amount of plaintiff's claim to recover back what it had paid on the \$308,340.35 note was deducted from such expenditure by defendant after 6th June. The adjustment of the Tripartite Agreement, on the other hand, had, as its basis, that defendant, for all its conversion expense increasing the cost and value of the railroads, was to have allowance up to the limit of the capitalization in bonds and stock on which plaintiff was to pay the stipulated interest and dividends.

Under the *First Principal Question* it has been shown (*supra*, p. 56) that, for conversion during the period, 14th February–6th June, defendant expended the great sum of \$1,481,051.58, the amount of which payable from the \$6,000,000 under Art. V of the Lease, was \$1,017,963.18 (*supra*, p. 56). If our argument of the *First Principal Question* prevail, there would, of the principal recovery below of \$1,740,258.38, remain for consideration on the merits only an amount approximating \$722,000. If there also prevail the argument as to the \$308,340.35 note in

the last chapter, the amount still remaining for discussion would not exceed about \$416,000. And the recovery below of such amount of \$416,000 (and also the \$308,340.35, if the argument of the last chapter should not prevail) rest upon the Referee's decision to set aside the Tripartite Agreement and to overrule the principle of the adjustment between the parties which it provided. That principle, as we have said, was that defendant should have credit against its Lease obligations for its payments for conversion, whenever the conversion had been done, up to the point where—all of its construction cost being included—the capitalization limit of \$18,925,000 should be reached. Or, to put it from the other view, that plaintiff should pay rental reckoned on the full amount of capital expended by defendant on the railroads up to the limit of \$18,925,000* representing capital securities of defendant or subsidiary lessor companies.

Exceptions specially raising this Question.

Since the Referee has not, by any finding in the Decision, dealt with the original merits of the adjustment of August, 1894, incorporated into the Tripartite Agreement, the question as to such merits is sufficiently presented by the defendant's exception at *fol.* 767, 768 to the Sixth Conclusion of the Referee at *fol.* 744, 745, that defendant was, on 1st September, 1894, indebted to the plaintiff in the principal sum of \$1,740,258.38 and awarding judgment accordingly with interest.

The question is more especially presented by the exceptions dealt with under the *First Principal Question* (*supra*, at pp. 57–58).

It is also presented by the exception at *fol.* 794—

* The \$925,000 of bonded debt assumed by defendant is properly treated in the Agreement, and for convenience in this argument, as expenditure of the defendant itself.

797 to the Referee's refusal of defendant's request 45 as made at *fol.* 377 as follows :

“ That prior to the commencement of this
“ action and subsequent to February 14th,
“ 1893, the date of the lease, the defendant
“ expended in the cost of conversion of the
“ demised railroads, a sum in excess of
“ \$6,000,000, the proceeds of the stock and
“ bonds, mentioned in the complaint and
“ lease, making the total capital expendi-
“ tures on the demised properties \$308,-
“ 340.35 in excess of \$18,925,000 the total
“ capitalization and bonded indebtedness of
“ the defendant.”

It is also presented by the exception at *fol.* 794-797 to the finding 45 as made by the Referee as follows (*fol.* 379, 380) :

“ That the alleged adjustment of accounts
“ between the companies was made from
“ the book entries appearing upon the books
“ of account of the plaintiff and defendant
“ respectively, and that upon such books of
“ account appeared and were taken into con-
“ sideration moneys expended by the de-
“ fendant in the construction and in convert-
“ ing its road into an electric railroad prior
“ to June 6, 1893 ; and there also appeared
“ upon such books and were taken into con-
“ sideration upon such accounting, many
“ items charged to construction which were
“ not properly so charged, and the moneys
“ therein set forth had not been expended
“ for the purposes of construction or convert-
“ ing the railroad in question into an elec-
“ tric railroad.”

So also by the exception at *fol.* 810 to the Referee's refusal to find conclusion 20 presented by the defendant at *fol.* 646 as follows :

“ That under the provisions of the Lease
“ of February 14th, 1893, the obligation of

“ the defendant was to expend in payment
 “ of the cost of conversion of the railroads
 “ into an electric railroad, the proceeds of the
 “ \$3,000,000 of stock and the \$3,000,000 of
 “ bonds mentioned and referred to in Article
 “ V of the Lease, to the extent of \$6,000,000
 “ of such proceeds and such additional sum
 “ as would make the total capital expendi-
 “ tures of the defendant company, including
 “ its bonded indebtedness, \$18,925,000.”

POINT I. [*Seventh Principal Question.*]

The adjustment between the plaintiff and defendant provided by the Tripartite Agreement was fair in itself. Defendant was justly entitled to allowance—whether against the \$6,000,000 under Art. V of the Lease or any other part of its capital—of its entire expenditure for conversion or construction of the railroads.

Defendant is entitled to the stipulated rate of rental reckoned upon its entire expenditure up to \$18,925,000 upon the actual cost of the railroads which it turned over to plaintiff for the 999 years of the Lease.

Although, under the terms of the Lease, the payment of *rental* was limited to dividends or interest upon the capitalization of \$18,925,000 (Art. XIV at *fols.* 82–85), and although, by the Lease, defendant was stripped of every dollar's worth of property with which it might itself have paid dividends or interest upon an additional capital expenditure, defendant was obliged under the terms of the Lease, as the Referee construed it, to expend a sum vastly in excess of its capitalization, or, in default thereof, to pay now a judgment for that sum, with interest for sixteen years. That this is completely subversive of the proposal made by Hollins & Company to defendant's

stockholders for their consideration and acceptance (finding 3, at *fols.* 292–302; II, at *fols.* 654–658), and that it violates grossly the understanding which led to the making of the Lease, and which induced the expenditure by defendant of its money upon property of the use of which the Lease deprived it for 999 years—that is to say, forever—is, we submit, shockingly apparent. The real understanding between the parties need not be determined from their acts and writings *in pais*, for it appears unmistakably and unambiguously in the strict terms of the Lease itself. The defendant's expenditure is demanded in two articles of the Lease. There is Article V, which demands the expenditure of \$6,000,000, and of which, for the moment, we speak first, although in the Lease itself it appears, and significantly, as the second of the two articles—and there is further Article IV, which requires the lessor to “use, apply and expend” “in payment of the cost of “converting the railroads of the lessor into an electric railroad”

“all moneys, credits or securities on hand
“at the date this lease shall take effect, *less*
“the amount required to pay and discharge
“the indebtedness, obligations and liabilities
“of the lessor as of that date other than
“its bonded indebtedness upon bonds issued
“or assumed by it, and *less* the amount of
“its surplus earnings diminished by a *pro*
“*rata* amount of accrued interest and accrued
“rentals agreed to be paid by the lessor
“and a *pro-rata* amount of taxes for the
“current year” (*fol.* 67).

Within the limits of those two articles it was literally *impossible* that more than \$18,925,000 should be expended by the lessor. Deducting, as required by Art. IV, from defendant's moneys, securities and credits on hand, defendant's indebtedness, which under the very same article defendant was to pay

(*fol.* 69), and further deducting, as the article required, the amount of defendant's surplus, there could remain for the conversion fund only the amount of defendant's uninvested capital. We have already given a calculation (*supra*, pp. 70-71, 82-84) showing that the amount to be expended under this Article precisely equalled the proceeds of former sales of stocks and bonds still on hand, less the value of conversion work which had been done but not yet paid for. And, irrespective of calculation, it is evident that plaintiff's "moneys securities and credits on hand"—its floating capital—must have been constituted of no more than three elements, to wit: (1) its surplus, (2) moneys to pay current indebtedness (including, of course, conversion indebtedness), and (3) uninvested capital. Since the first two were to be deducted, it is plain that Article IV called for the expenditure upon conversion of precisely the uninvested capital. The addition of the work payable for under Art. IV and the \$6,000,000 to be expended under Art. V to the work already done would, therefore, have given plaintiff a railroad in which the full capital sum of \$18,925,000 would have been invested, and upon which sum it was to pay rental.

How came it about then that this action was brought upon a theory contradicting the plain intention of the Lease? And how came it that the eminent Referee should have sustained that theory? In the fuller light of the ample discussion down to this point the source of the error is clear. It will be remembered that, in early January, 1893, when the terms of the Lease had so far been settled that defendant's directors issued a call to their stockholders for a special meeting to ratify it (finding 3, at *fols.* 293-302), there was yet unexpended a large portion of the proceeds of the stock issued to cover the cost of conversion which had begun in July, 1892; and, on the day

that the Lease was executed, 14th February, 1893, \$500,354.35 still remained unexpended of such proceeds (Finding Ninth, at *fol.* 738), while conversion debts, already incurred, were only \$296,439.78 (Finding A-12 at *fol.* 542). So that, at the time the Lease was made, the only meaning of Arts. IV and V was that the difference between such \$500,354.35 and \$296,439.78, plus the new \$6,000,000 should be expended for new conversion, so as to make the full investment of \$18,925.000. There followed the months of delay which arose, perhaps, from several causes, the first being the injunction obtained by Markey ; but, as plaintiff itself concedes or rather claims, the more important reason of the delay was its own delay to provide the stipulated \$4,000,000 of security (*supra*, p. 67).

When the Markey injunction was served, defendant was immediately advised by the plaintiff's officers and sole stockholders on no account to cease the work of conversion, which was to be paid for "out of the funds which were to come to us" (Burke, *fol.* 5249; *vide supra*, pp. 76-80). And such sole stockholders of plaintiff actively participated in supervising the work of conversion (*fols.* 5237, 5238, 5252, 5253, 5283, 5661). The result was that, on 6th June, 1893, when the Lease "took effect," that is to say, when the term of years therein granted began to run—there was, under the terms of Art. IV standing alone, no more money to expend, but instead a large deficit.

Plaintiff's own complaint, which did not make any claim under Art. IV of the Lease—nor indeed mention that article—is a sufficient concession that, between 14th February and 6th June, the large amount of cash assets in defendant's hands on the earlier date had been absorbed by conversion work. On 14th February defendant had on hand \$824,070.28 in moneys, credits and securities (finding A-11 at *fol.* 541)—or, if supplies be added, as plain-

tiff claims they should, an amount greater by several hundred thousand dollars. The debts, including items of \$254,104.18 and \$42,335.60 for conversion, \$49,813.59 for accrued interest and taxes and \$2,187.50 for the repair of the Palmetto Street sewer, were \$456,480.88, and defendant's surplus was \$602,939.19.

Vide statement, supra, pp. 68, 69.

But on 6th June, 1893, as is shown by the findings XXIV at *fol.* 681, A-41 at *fol.* 566 and A-75½ at *fol.* 630, summarized in the note on p. 85, *supra*, defendant's moneys, credits and securities on hand had been reduced to \$485,026.65 ; debts, including accrued interest and taxes and items of conversion debt of \$600,000, \$271,949.06 and \$66,457.90 had increased to \$1,250,924.95. Thus, the surplus had no cash or current assets to make it good, or any assets whatever to make it good, except as the construction expense since 14th February should be returned to it from the proceeds of the new \$6,000,000 securities.

The deficit of current cash assets was thus demonstrably due to the fact that defendant had put all of its surplus into the conversion work, and in addition new money borrowed to the extent of \$600,000 (finding A-41, at *fol.* 566). In August, 1894, however, there was the accounting between the parties for the Tripartite Agreement in which, as is fairly to be inferred from the finding of the Referee himself, the understanding upon which defendant entered upon the conversion work prior to 6th June, 1893, was carried into effect (finding 45 at *fol.* 378, 379).* Seven years after the

* The Referee found "that upon such books of account appeared and was taken into consideration moneys expended by the defendant in the construction and in converting its road into an electric railroad prior to June 6th, 1893."

Lease was made, and more than five years after that accounting, plaintiff's lawyers "advised" that the charge against the conversion fund for work done prior to 6th June, 1893, was "improperly made under the terms of the Lease" (finding A-45 at *fols.* 591, 592). Until after such five years plaintiff itself had not claimed or thought of any such construction of the Lease (Williams, *fols.* 4857-4859). And, when this action was commenced, plaintiff shrewdly set forth in its complaint only the terms of Art. V of the Lease, entirely ignoring Art. IV. *It was this separation in thought of Art. V from the rest of the Lease—and particularly from Art. IV—which we submit, led the Referee into his complete error.*

For it is clear, as we have shown (*supra*, pp. 283-285)—and indeed it requires no demonstration—that, at the time the Lease was made, those two articles establishing the conversion fund could have, under the circumstances as they then were, but a single meaning—which was that *the whole of defendant's authorized capital, but no part whatever of its surplus, should be invested in the railroad leased to plaintiff.* That meaning represented the parties' purposes as they are disclosed in the plain and untechnical language of the circular issued to defendant's stockholders proposing the Lease, and which correctly embodied the Hollins offer upon which the stockholders were to act (finding 3 at *fol.* 293). At the time the Lease was drawn and executed there were large sums of money from defendant's previously issued capital securities still unexpended; and it was provided that defendant should expend these and \$6,000,000 proceeds of the new securities in addition; no further moneys of any kind were required to be expended by the lessee. Now, shall not this meaning prevail—the only meaning which the words could have had when the contract was drawn and when it was executed? Or shall the contract be given a meaning which—even if the contract might or would have had that meaning, had it been

framed and executed under other circumstances or at another time—it very certainly did not have when the agreement was framed and executed? Certainly the words of the contract must be construed in the light of the facts as they were, and as they were known to the parties, when the words were agreed to. Certainly the new conditions existing months afterward, when possession was surrendered to plaintiff, cannot change the meaning of the contract itself.

Chesapeake & Ohio Canal Co. v. Hill, 15 Wallace, 94: Defendant had granted to plaintiff the right for a certain term of years at a certain rent to draw from the canal so much water as would pass through an aperture of specified size (stated in square inches) in an iron plate fixed in the side of the canal. This water was to be used for a mill which plaintiff was to build several hundred feet away from the canal. He built his forebay at great expense to plaintiff's knowledge; but its construction was such that it hindered the passage of the water from the aperture, so that the flow was not as great as, according to the principle of hydraulics, would ordinarily flow from such aperture. It was held that the defendant was obliged to supply the amount of water which the parties had in mind in fixing the size of the aperture irrespective of the size actually required in view of the peculiar construction of the forebay. By BRADLEY, J., at p. 99:

“The large investment of capital made by
 “the appellee in sole reliance on the water-
 “power which the lease secures, with the
 “full knowledge which the appellants had
 “of this reliance and intended investment,
 “renders it necessary that we should look
 “carefully to the substance of the original
 “agreement of January, 1864, as contra-
 “distinguished from its mere form, in order
 “that we may give it a fair and just con-
 “struction, and ascertain the substantial in-
 “tent of the parties, which is the fundamen-
 “tal rule in the construction of all agree-

“ments. It is not to be presumed that they
“intended to provide for a certain aperture
“in the canal without respect to the amount
“of water it would discharge and the pur-
“pose which that water was to accomplish.
“What the appellee sought was *water-power*
“to drive the machinery of an expensive
“mill. The appellants knew this to be his
“object, and the thing leased or granted
“was intended to be and in fact was water,
“as the means of creating such power.
“* * * The parties clearly had in view a
“fixed quantity of water to be received in a
“given time. In ascertaining their mutual
“rights under the lease, it is important to
“know how much this quantity was. When
“we know that we know the substance of
“the agreement.”

Clark v. N. Y. Life Ins. & Trust Co., 64 N. Y., 33: A restrictive covenant provided that houses built on “lots fronting “East 22nd Street should be set back from the building line $7\frac{1}{2}$ feet. This covenant was sought to be enforced against the owner of the lots situated on the corner of Broadway and East 22nd Street. The Court allowed in evidence a map before the parties at the time the contract was made (but not referred to in the contract), which showed lots of 25 x 100 in the middle of the street, while on the corner the 25 feet faced Broadway and the lot ran back 96 feet on the line of East 22nd Street. It was held, therefore, that the 96 feet east of Broadway did not come within the operation of the restrictive covenant since, within the contemplation of the parties at the time the covenant was made, it was not “a lot fronting said street.” By CHURCH, C. J., at p. 38 :

“The question in every contract is to de-
“termine what the parties intended, and if
“the language is clear and unambiguous
“that is to control ; but it is generally com-
“petent, and often indispensable, to refer to
“the subject-matter and other circum-

“stances, and to consider what the parties
“saw and knew in order to ascertain their
“meaning.”

D. L. & W. R. Co. v. Bowns, 58 N. Y., 573.
By ALLEN, J., at p. 579 :

“Contracts are not to be construed liter-
“ally when expressed in general terms,
“when it is evident that, so construed, they
“would not conform to the intent of the
“parties. In passing upon stipulations in
“contracts, qualifications and exceptions are
“frequently implied and are necessary to
“give effect to the intent of the parties, as
“such intent can be collected from the whole
“contract, examined in view of the circum-
“stances under which it was made, and the
“purposes to be accomplished, and the busi-
“ness to which it relates.”

Clark vs. Devoe, 124 N. Y., 120. By VANN, J.,
at p. 124 :

“A covenant is simply a contract of a
“special nature, and the primary rule for
“the interpretation thereof is to gather the
“intention of the parties from their words,
“by reading not simply a single clause of
“the agreement, but the entire context, and,
“where the meaning is doubtful, by con-
“sidering such surrounding circumstances
“as they are presumed to have considered
“when their minds met.”

*Pressed Steel Car Co. vs. Eastern Ry. Co. of
Minnesota*, 121 Fed., 609. By SANBORN, J., at p.
611 :

“The purpose of a written agreement is
“to evidence the terms upon which the
“minds of the parties to it meet when they
“make it. Hence the true end of all con-
“tractual interpretation is to ascertain that
“intention, and when it is found it prevails
“over verbal inaccuracies, inapt expres-
“sions, and the dry words of the stipulations.
“The Court should, as far as possible, put
“itself in the place of the parties when
“their minds met upon the terms of the

“ agreement, and then, from a consideration
“ of the writing itself, its purpose, and the
“ circumstances which conditioned its mak-
“ ing, endeavor to ascertain what they in-
“ tended to agree to do—upon what sense or
“ meaning of the terms they used their
“ minds actually met.”

We submit that Arts. IV and V provide a single conversion fund, from which were excluded the defendant's funds required for its indebtedness or its surplus. The provisions for the conversion fund are, it is true, in separate paragraphs; but the Lease contains many other cases where distinct paragraphs deal with things *in pari materia*. Thus, the subject of rental is dealt with in Arts. VII, VIII, XIV, XV and XVII; so the subject of additions and improvements during the term of the Lease occupies Arts. XX, XXI, XXII, XXIII, XXIV, XXV and XXXIII; so the subject of plaintiff's operation of the leased railroads is contained in Arts. XXVII, XXVIII, XXIX, XXX and XXXII; while the single subject of the guaranty fund of \$4,000,000 occupies the seven separate Arts. XXXV, XXXVI, XXXVII, XXXVIII, XXXIX, XL and XLI. All of the articles or provisions of the agreement in any way bearing upon the same subject must under the well settled rule of construction be read together upon the subjects with which they deal.

O'Brien v. Miller, 168 U. S., 287, by WHITE, J., at p. 297 :

“ The question presented involves not the
“ interpretation of this language apart from
“ the whole agreement, but is, on the con-
“ trary, the ascertainment of the meaning
“ of the entire contract. The fallacy which
“ underlies the assertion as to want of all
“ ambiguity in the bond arises, therefore,
“ from presupposing that, in order to estab-

“lish want of ambiguity in a contract, a few
 “words can be segregated from the entire
 “context, and that because the words thus
 “set apart are not intrinsically ambiguous,
 “there is no room for construing the con-
 “tract itself. In other words, the confu-
 “sion of thought consists in failing to dis-
 “tinguish between the contract as a whole
 “and some of the words found therein.
 “* * * The elementary canon of inter-
 “pretation is, not that particular words
 “may be isolatedly considered, but that the
 “whole contract must be brought into view
 “and interpreted with reference to the
 “nature of the obligations between the par-
 “ties, and the intention which they have
 “manifested in forming them.”

Miller v. Hannibal & St. Jo. R. R. Co., 90 N. Y.,
 430. By ANDREWS, C. J., at p. 433 :

“It is the imperative duty of courts to
 “give effect, if possible, to all the terms of
 “an agreement. The construction is to be
 “made upon a consideration of the whole
 “instrument, and not upon one or more
 “clauses detached from the others; and this
 “principle applies as well to instruments
 “partly printed or partly written as to those
 “wholly printed or wholly written.”

Pressed Steel Car Co. v. Eastern Ry. Co. of
Minnesota (supra). By SANBORN, J., at p. 611:

“The intention of the parties must be de-
 “duced from the entire agreement and from
 “all its provisions considered together, be-
 “cause, where a contract has many stipula-
 “tions, it is plain that the parties understood
 “and agreed that their intention was not
 “expressed by any single part or provision
 “of their agreement, but by every part and
 “stipulation, so construed as to be consistent
 “with every other part and with the entire
 “contract.”

Kitching v. Brown, 180 N. Y., 414. By WERNER, J., at p. 427 :

“The primary rule of interpretation of
“such covenants is to gather the intention
“of the parties from their words, by read-
“ing, not simply a single clause of the
“agreement, but the entire context, and,
“where the meaning is doubtful, by con-
“sidering such surrounding circumstances
“as they are presumed to have considered
“when their minds met.”

Reading together Arts. IV and V as providing the conversion fund, it is clear that that fund was not to include any part of defendant's moneys or property required to keep good its surplus or to pay its indebtedness. Nor does it matter that the exceptions are set forth only in Art. IV, which describes only a part of the conversion fund. The fundamental purpose was obvious, and, at the time the Lease was drawn, the circumstances were such that it occurred to no one that the provision was not a complete and unambiguous expression of the intention of the parties. As defendant's perfectly known and realized situation then was, the exclusion of surplus and indebtedness from the part of the fund contributed by Art. IV, obviously excluded them from the whole fund. Only the delay incident to plaintiff's own delay in furnishing the \$4,000,000 security, the effect of which was clearly not contemplated when the words of the Lease were drafted, brought it about that on 6th June, 1893, when the term of years commenced, there remained nothing to be furnished under that article.

And it was that which caused the Referee so profoundly to mistake the purposes of the contract.

It may help the Court better to understand the situation to have the schedule we now present showing the expenditure by defendant of the full amount

of \$18,925,000 upon the railroad and \$308,340.35 (the amount of the note given under the Tripartite Agreement) in addition. We refer in each case to the finding of the Referee sustaining the item or, where there is no finding, to the pages of this brief (*infra*) where the evidence is discussed. There are also a few minor figures not separately treated in our brief, but which we shall explain in foot notes following the statement. We wish particularly to point out that the accounting of August, 1894, was, even in the light of this re-examination many years later, *substantially* accurate and that any disturbance of it at this late day would be a serious injustice.

*Statement of Defendant's Capital Expenditures on
Railroads Leased to Plaintiff.*

Expenditure prior to February 14th, 1893 (finding A-76, fol. 631)	\$12,424,645.65
Expenditure subsequent to 14th February, 1893 (finding A-36, fols. 560, 561).....	6,400,483.14
Expenditure subsequent to 14th February, 1893, inadvertently omitted from finding (Stipulation, fols. 1238, 1239)	5,993.88
Expenditures represented by Group I of Journal Entries (<i>infra</i> , pp. 300-321).....	137,797.03
Expenditures represented by Group II of Journal Entries (<i>infra</i> , pp. 321-324).	24,000.00
Expenditures represented by Group III of Journal Entries, less \$4,132.05 included in finding A-36 (<i>infra</i> , pp. 325-328).....	49,592.89
Expenditures represented by Group IV of Journal Entries (<i>infra</i> , pp. 329-330)..	90,000.00

Expenditures represented by Group V. of Journal En- tries, less \$80,000 in- cluded in finding A-36 at <i>fol. 561 (infra, pp. 330-336)</i>	285,020.95	
Various items correcting de- fendant's books, from which the figures heretofore given were taken and which are listed on Defendant's Ex- hibit 1467, at page 3187 of the record (Foot Note *)...	24,236.81	
		<hr/> \$19,441,770.35
Deduct :		
Items of real estate, etc. sold listed in finding A-75 at <i>fol. 629</i>	\$192,889.26	
Rebates by clerical error not included in find- ing A-75, but found in finding A-37 at <i>fol. 563</i> (aggregating \$18,284.33 found in A-37 less \$2,438.13 allowed in A-75)....	15,846.20	
Items of defendant's operating expenses before 6th June, 1893, thereafter paid by plaintiff (Foot Note **).....	41,349.95	250,085.41
Total amount of de- fendant's moneys in- vested in railroad...		<hr/> \$19,191,684.94

* These corrections consist of many items ; and detailed testimony was given concerning them by the accountants on the trial (*fol. 7239-7242*). We do not deem it suitable to burden the Court with a statement setting out the reason for each one of these many minor corrections.

** The sum of \$41,349.95 was credited to plaintiff on defendant's books as expenditures made by plaintiff on account of defendant's debts for operation which were incurred before 6th June, 1893. This amount was accepted by the parties in the adjustment of the accounts which preceded the Tripartite Agreement. Upon the

Amount of defendant's authorized capital stock and bonds	18,925,000.00
Amount of defendant's surplus invested	266,684.94
Interest on surplus invested (Foot Note ***)	41,655.41
	<hr/>
	\$308,340.35

POINT II. [*Seventh Principal Question.*]

The \$308,340.35 note was, therefore, not “ without consideration.”

It matters not whether the details of the Tripartite adjustment were correctly worked out. There *was* an adjustment. There is neither finding nor proof that there was fraud or bad faith. The finding that the note was “ without consideration ” was plainly erroneous, whether or not the merits of the adjustment can be established in all particulars. But we shall now show that they can be established.

trial the plaintiff claimed, however, and the Referee so found, that plaintiff's payments on account of defendant's operation expenses amounted to \$42,532.84 (finding XXXIX, at *fol.* 696). The vouchers are spread on the record at *fol.* 1245-1259, 1267-1294; and it is not worth while to re-examine them all in this brief to determine whether the one figure or the other is the correct one,

*** Upon the adjustment between the parties which preceded the Tripartite Agreement and the calculations which are, as the Referee has found, embodied in Defendant's Exhibit 56 (finding A-61, at *fol.* 617, 618), it appeared that defendant had applied its own surplus to the cost of conversion; and this, as we have seen, had occurred between 14th February and 6th June, 1893. It was agreed that the defendant should be allowed interest on its surplus from 6th June, 1893, to the date of the adjustment as a compensation for the loss of the use of the surplus. This item of interest went, as appears on Defendant's Exhibit 56 (page 3183, Vol. 8) to make up the amount of \$308,340.35, for which the note was given by plaintiff and the Long Island Traction Company under the Tripartite Agreement.

POINT III. [*Seventh Principal Question.*]

The "journal entries" allowed for in the Tripartite adjustment were right in themselves.

In the preceding schedule we have referred to expenditures represented by "journal entries," the amounts of which are not contained in any finding of the Referee. It is not claimed that any of these entries was fictitious in the sense that it represented an expenditure not in truth made by the defendant. There is no evidence of that kind in the case. Each one of the entries represented an actual expenditure (Forsdick, *fols.* 7245, 7287).

Plaintiff's sole claim is that the moneys in question were not expended for *conversion* purposes (plaintiff's witness, T. S. Williams, *fols.* 4835-4844). Attack was made upon these particular entries for the reason that the expenditures which they represent had been originally charged by defendant's bookkeepers against a non-capital account, and only later, by journal entry, were transferred to the proper, *i. e.*, capital, account (Lewis, *fols.* 7212-7214, 7463, 7488, 7489). As to some of the entries, the lapse of time has not caused a loss of the undisputed *data* explaining them; and their correctness or incorrectness—that is, whether or not the expenditure which they represent was or was not for a construction purpose—becomes a question solely of law. As to others, the precise data *have*, to some extent, been lost or forgotten; and the evidence adduced at the trial may not completely demonstrate the character of the expenditure. Nevertheless, it should be remembered that there is not even a scintilla of evidence of fraudulent design on the part of the directors, the findings and judgment below resting upon the sheerly legal proposition that acts done by interested directors are void-

able. This principle, even when applied in a proper case, cannot militate against the presumption that, when they supervised the making of the entries upon which all the contemporaneous *data* cannot now be gathered, they did so with knowledge of facts which made them proper.

For convenience we shall divide the "Journal Entries" into five groups, as follows :

I.—*Credits to Operation and Charges to Capital Account :*

(1) Charge to Construction (<i>fol.</i> 1172, 1173) [discussed here- under, pp. 300-321]	\$82,391.00
(2) Charge to Real Estate (<i>fol.</i> 1178, 1179) [discussed here- under, pp. 300-321]	28,206.08
(3) Charge to Equipment (<i>fol.</i> 1182) [discussed hereunder, pp. 300-321]	27,200.00
	<hr/>
	\$137,797.03

II.—*Credits to Passenger Earnings and Charges to Capital Accounts :*

(4) Charge to Construction (<i>fol.</i> 1174) [discussed hereunder, pp. 321-324]	\$20,000.00
(5) Charge to Real Estate (<i>fol.</i> 1174) [discussed hereunder, pp. 321-324]	4,000.00
	<hr/>
	\$24,000.00

III.—Credits to Surplus (Interest) and Charges to Capital Accounts:

(6) Charge to Construction (<i>fols.</i> 1184-1186, 1191) [discussed hereunder, pp. 325-328]...	\$27,619.67
(7) Charge to Construction (<i>fols.</i> 1192-1197, 1199) [discussed hereunder, pp. 325-328]...	20,644.14
(8) Charge to Construction (<i>fols.</i> 1201, 1202) [discussed here- under, pp. 325-328].....	163.89
(9) Charge to Construction (<i>fols.</i> 1203-1206) [discussed here- under, pp. 325-328].....	5,297.24
	<hr/> \$53,724.94

IV.—Credit to Surplus (Dividend) and Charge to Capital Account:

(10) Charge to Construction (<i>fol.</i> 1175) [discussed hereunder, pp. 329-330]	\$90,000.00
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V.—Credits to Supplies and Charges to Capital Accounts:

(11) Charge to Real Estate (<i>fol.</i> 1180) [discussed hereunder, pp. 330-332]	\$80,000.00
(12) Charge to Equipment (<i>fols.</i> 1212-1221) [discussed here- under, pp. 330-334].....	150,245.79
(13) Charge to Construction (<i>fols.</i> 1176, 1177) [discussed here- under, pp. 330, 331, 333- 336].....	134,775.16
	<hr/> \$365,020.95

Such journal entries altogether
amounting to..... \$670,542.92

Taking up the entries in detail, we shall first state for each group the general considerations applying to the entries within it, and then discuss the evidence bearing upon the particular items.

GROUP I.

Credits to Operation and Charges to Capital Accounts.

<i>Charge to Construction (fols.</i>	
1172, 1173).....	\$82,391.00
<i>Charge to Real Estate (fols.</i>	
1178, 1179).....	28,206.03
<i>Charge to Equipment (fol. 1182)</i>	27,200.00
<hr/>	
<i>Total.....</i>	<i>\$137,797.03</i>

Defendant's capital stock and bonds, amounting on February 14, 1893, to \$12,000,000 (finding 2 at fols. 291, 292), had been issued for cash at par, and the proceeds had been paid into its treasury (fols. 7036-7047, 7052-7053). The expenditure of this money was reflected originally in three accounts constituting defendant's "capital" accounts, viz., (1) construction, (2) real estate and (3) equipment (fols. 4301-4305, 7201). All expenditures for road-bed and tracks were charged to the construction account; those on account of real property owned by the company were charged to the real estate account, and those for the road's equipment were charged to the equipment account.

In the early nineties a fourth capital account was instituted,—“Extraordinary Expenditures on account of Electricity.” The electrification or conversion of defendant's road was impending; and the officers of the Company, when any extensive repairs were made, in addition to the work purely of maintenance prepared the portion of the road upon

which work was done for the proposed electrification. The excess cost of this work over the mere repair of a horse street surface railway was charged to this fourth capital account (*fols.* 7056-7062). The total amount expended and charged to the four accounts on and before February 14, 1893, was, as found by the Referee, \$12,424,645.65 (finding A-76, at *fol.* 631; defendant's exhibit 1457 at *fols.* 9143-9146).

Defendant's expenditure for operation as reflected in its operation account contained fifteen branches having to do with maintenance charges, as follows (defendant's exh. 1465, p. 3184, vol. 8, which is a correct transcript from defendant's books, *fols.* 7165, 7166):

1. Maintenance of road bed and tracks ;
2. Maintenance of harness and stable equipment ;
3. Horse shoeing ;
4. Renewals of horses ;
5. Provender ;
6. Legal expenses ;
7. Advertising and office expenses ;
8. Rents ;
9. Salaries ;
10. Maintenance of line equipment ;
11. Maintenance of buildings and fixtures ;
12. Light ;
13. Maintenance of cars ;
14. Maintenance of motor cars ; and
15. Maintenance of electric motors.

It is obvious that, at a time when large construction works were in progress, a substantial portion of defendant's expenditures falling within these categories of the operation account would be strictly due to the carrying on of the construction work ; and for many years it had been the practice of the defendant company to take account at the conclu-

sion of each fiscal year of the sums spent for the purposes specified in the operation accounts, but which were actually capital expenditures. These sums would then be transferred to the proper capital accounts. This manner of bookkeeping was followed solely for convenience, so that, for example, the classification of "horse-shoeing" would not appear once in the operation account and again in each of the three capital accounts, thus creating difficulties for the bookkeeping staff, with a necessity of reference of each daily item to a superior officer for the determination of the question to which of the four horse-shoeing accounts such items should be charged. Upon this system of the company, and the reason for it, we have the testimony of Mr. Lewis, who in 1893 was defendant's president, and who had been associated with it for twenty-five years (*fol.* 5254).

"There were items amounting in round
 " numbers to about \$160,000 * * *
 " which had previously been charged to
 " operating account, and by the direction of
 " the Executive Committee, and confirmed
 " by the board of directors, the proper
 " officers were authorized to credit the
 " operating account with about \$160,000
 " and charge the construction account with
 " a like amount, which had been the prac-
 " tice from year to year for many years of
 " the Company in order to adjust its ac-
 " counts, there having been many charges
 " from time to time during the particular
 " current year to operating account which
 " were finally taken out at the end of the
 " fiscal year and adjusted * * * be-
 " cause they were really a construction
 " charge, but temporarily put in the operat-
 " ing account for convenience. * * * It
 " had been done from year to year. The
 " reason of its being done was for con-
 " venience; rather than to make charges

" weekly or daily to construction account of
 " minor expenditures, they were put into
 " the operation account, and subsequently
 " gotten together and through one resolu-
 " tion directing the proper officers to make the
 " change as we did in September, 1893 "
 (fols. 7097-7100).

No claim can properly be made that, in its mak-
 ing of the journal entries, there was anything un-
 usual. For the transfers made by the defendant's
 officers by journal entry at the end of the fiscal
 year previous to the transfers of 1893 from opera-
 tion to construction accounts had been as follows :

For the year 1876 (fol. 6867)....	\$2,250.00
" " " 1881 (fols. 6867, 6868).....	180,889.63
For the year 1882 (fol. 6868)....	19,324.44
" " " 1883 (fol. 6869)....	60,210.98
" " " 1884 (fol. 6869)....	6,646.76
" " " 1885 (fol. 6869)....	30,212.96
" " " 1886 (fol. 6870)....	29,128.53
" " " 1887 (fols. 6870- 6872).....	160,777.95
For the year 1888 (fol. 6872)....	2,545.77
" " " 1889 (fols. 6872, 6873).....	10,737.19
For the year 1890 (fol. 6873)....	57,300.00

The journal entries included in Group I made as
 of June 30th, amounted to \$137,797.03, less than
 the similar journal entries in 1881 or 1887. They
 were authorized by resolution of defendant's execu-
 tive committee on 27th September, 1893, and of de-
 fendant's board of directors on 28th September,
 1893. At the meeting of defendant's executive
 committee, September 27, 1893 :

" The Secretary further reported to the

“ Committee that it was necessary to re-
 “ vise and readjust the accounts of the
 “ Company for the year ending June 30,
 “ 1893, by charging to construction and
 “ crediting to operation sundry items of ex-
 “ penses for services rendered, material
 “ furnished, paid from the operation funds,
 “ which were chargeable to construction, in
 “ all, amounting to \$160,119. The report
 “ of the Secretary was approved and referred
 “ to the full Board for determination (*fols.*
 “ 946-947).”

On the following day defendant's board of
 directors passed a resolution approving such action
 of the Executive Committee (*fols.* 912-913) :

“ On motion, duly made and seconded,
 “ the Executive Committee and Messrs.
 “ Leggett and Keeney were authorized to
 “ examine the account of the Brooklyn City
 “ Railroad Company for the year ending
 “ June 30, 1893, with authority to instruct
 “ the Secretary and Treasurer and to make
 “ the necessary entries to correct the ac-
 “ counts to that date by charging construc-
 “ tion account and crediting operation ac-
 “ count with like amounts * * *, and
 “ such other correction as may be deemed
 “ necessary and proper.”

The large figure, \$160,119, is given in the reso-
 lution because it included also the second group of
 journal entries, amounting to \$24,000. The form
 of the journal entries made pursuant to the resolu-
 tion was as follows (*fols.* 7183-7185) :

" JUNE 30, 1893-(Continued).

198 Construction (Road Bed and Track)		
Dr. to.....	\$82,391.00	
216 Operation, viz:		
Labor.....	\$13,510.00	
Trucking, viz.:		
Harness.....	\$3,000.00	
Horse Shoeing..	5,000.00	
Renewals-Horses	12,681.00	
Provender.....	23,000.00	43,681.00
Legal Expenses...	7,000.00	
Advertising.....	4,000.00	
Salaries Supts., etc.	12,700.00	
Line Repair Labor	1,500.00	\$82,391.00
205 Real Estate Dr. to	28,206.03	
216 Operation, viz.:		
Labor.....	14,206.03	
Salaries Prest., etc.	10,000.00	
Light.....	3,000.00	
Office Rent, etc...	1,000.00	28,206.03
202 Equipment Dr. to	27,200.00	
216 Operation, viz.:		
Labor Cars.....	14,000.00	
Motor do.	6,000.00	
Motors Elecr.....	7,200.00	27,200.00 "

Defendant, for the convenience of the Court, placed in evidence a table, printed on p. 3184 of vol. 8 of the Record as "defendant's exh. 1465." It shows the total amounts charged to operation during each month of the fiscal year 1892-1893 under each of the several sub-heads of that account, and states also the amount transferred to capital account from each such sub-head of the account. During the fiscal year 1892-1893, there was, as shown by "defendant's exh. 1465," charged to operation a total of as much as \$1,055,252.03, of which but \$137,797.03, or about 13 per cent., is transferred by the journal entry to capital accounts. Mr. Bogardus and Mr. Swin, who were chiefly concerned upon the defendant's books, had died at the time of the trial (*fol.* 4457, 7487). But the method by which the sums so transferred were arrived at is described in general by Mr. Lewis, who had maintained an active supervision over their work (*fol.* 7127):

" I consulted regarding the correctness of

“ those charges with Mr. Bogardus, who was
 “ then the secretary and treasurer of the Com-
 “ pany (*fol.* 7189). * * * I have looked over
 “ the statement referred to ” (defendant’s
 exhibit 1465), “ and it does not refresh my
 “ memory as to the reasons for making these
 “ charges in this way, because that plan had
 “ been followed for a great many years. The
 “ items specified refresh my memory as to
 “ the statements perfectly. We kept the
 “ accounts in this way at that time for the
 “ purpose of convenience. It was much more
 “ convenient to do it in that way than any
 “ any other. * * * My father, who was the
 “ secretary before me, had kept the accounts
 “ in this way from 1866 to 1884, when I suc-
 “ ceeded him, and I followed the same prac-
 “ tice; Mr. H. M. Thompson, who followed
 “ me, continued the same plan of charging
 “ and crediting, and Mr. Bogardus followed
 “ Mr. Thompson and did the same thing (*fol.*
 “ 7190, 7191).”

“ Q. While you were president of the
 “ Brooklyn City Railroad Company and dur-
 “ ing the work of conversion, were you
 “ actively engaged in that work so as to be
 “ familiar with the material received or
 “ work done, and generally with the work
 “ itself ?

“ A. Yes, in a very general way. I kept
 “ track of nearly everything in a general
 “ way.

“ Q. And was your personal information
 “ and knowledge sufficient, independent of
 “ the books, to determine whether the reports
 “ made by Mr. Bogardus and the accounts
 “ kept in the books were, generally speaking,
 “ true, fair and just ?

“ A. It was. * * * My general knowledge
 “ of the conditions and the explanation which
 “ I would always get from my treasurer in
 “ matters of this kind would lead me to pass
 “ upon these things intelligently. * * *
 “ I had, as I have stated, such information
 “ and familiarity with the work as arose
 “ from active superintendence of that work

"while I was president. I was daily in
"attendance and very active in the manage-
"ment of the affairs of the company (*fol.*
"7197-7199)."

Upon cross-examination Mr. Lewis was asked :

"Q. Did it ever strike you as at all sin-
"gular that it should have come out in even
"thousands of dollars if there was any cal-
"culation about it ?

"A. It would be very reasonable; with-
"out reference to the actual number, be-
"cause I think we were calculating all
"those things on as conscientious and con-
"servative a basis as we could, as I think
"we had done everything in the past as far
"as those charges were concerned (*fol.*
"7125, 7126). * * * The same care was ex-
"ercised in the apportionment of the amount
"which should be charged to construction
"and operation as in the other matters.
"What that care consisted of I do know ;
"very great care. We did it by carefully
"considering the whole question of time,
"and it was done by men who were capable
"of doing it, Mr. Bogardus and Mr. Swin
"and myself (*fol.* 7127)."

Criticism was made by plaintiff that the expendi-
ture of such \$137,797.03 did not appear to have
been made entirely after 14th February, 1893; and
that it might cover the whole year preceding 30th
June, 1893. That fact could well be conceded
without in the slightest affecting the propriety of
the charge. Such portion of the \$137,797.03 as
represents work done prior to 14th February,
1893, increases to that extent the amount of \$12,-
424,645.65 found by the Referee to be the cost of
the railroad on that day (finding A-76 at *fol.* 631),
that sum not taking into account the work repre-
sented by the expenditures covered by the "journal
entries" (defendant's exh. 1457 at *fol.* 9146). This
addition affects the calculation of the surplus

as of 14th February, 1893, presented, *supra*, at pp. 68, 69, causing it to increase in the same amount, and thus, because of the larger surplus to be subtracted, lessens to the same extent the moneys to be expended after February 14, 1893, under Article IV of the Lease. The remaining portion of the \$137,797.03, representing work after 14th February, 1893, goes directly in discharge of the defendant's obligation to expend moneys under Articles IV and V; so that the whole of that sum must be credited to defendant either by way of diminishing the amount to be expended by it under Article IV, or in discharge of its obligation to expend.

Freed from bookkeeping and legal technicalities, there is the fact that, if this money originally charged on defendant's books to Operation were in truth an expenditure upon the capital of the company of which plaintiff secured the full benefit when, on 6th June, 1893, it took possession of defendant's railroads, then it goes to make up the \$18,925,000 upon which and upon which alone, plaintiff pays rental under the Lease (Article XIV, *fols.* 82-85), and should not be retained by plaintiff without charge, plaintiff at the same time compelling defendant to expend the amount over again or pay a judgment which includes it. The Referee's ruling, which we have shown to be fundamentally in error, that \$6,000,000 must be expended by defendant after 6th June, 1893, irrespective of the large amount which had, on that date, already been expended after the execution of the Lease at plaintiff's request, of course operated to cast out the item of \$137,797.03 along with the other very large sums considered in our discussion of the *First Principal Question*. But if this unjust and almost monstrous ruling is not to prevail, then the whole of this sum should be credited to defendant as conversion work done prior to 6th June, 1893, in addition to the \$1,481,057.58

mentioned in Finding A-75 (*fol.* 628). The credit should be either (1) by way of reduction of the amount to be expended under Art. IV., or (2) by way of discharge of the obligation to expend under Arts. IV and V.

We shall now discuss in detail the different items of the journal entries aggregating the \$137,-797.03, prefixing the discussion of each item with a statement showing the total expenditure for each specific purpose during the fiscal year, and thereunder the portion of such expenditure transferred by journal entry as having been made on account of capital.

Maintenance of Road Bed and Tracks.

Total charge to operation account,	\$72,336.70
Transferred to capital account by	
"Journal Entry" (Deft's Exh.,	
1465).....	\$13,510.00

There is no specific testimony in the record concerning this item. Mr. Thompson, defendant's general manager until November, 1892 (*fol.* 7316), testified that, where conversion work was done in connection with repairs, the former was charged to "Extraordinary Expenditures on account of Electricity" (*fols.* 7056-7061. And in the fiscal year 1892-1893 such charges amounted to \$386,233.79 (plaintiff's exh. 1448 at *fol.* 8567). Apparently, upon the re-examination of the vouchers, made, as Mr. Lewis testified (*supra*, pp. 303-305), at the end of 1893 the amount of \$386,233.79 was found to be too small by \$13,510; and the journal entry was consequently made for purposes of correction. Plaintiff's accountant had full access to all defendant's vouchers (*fol.* 6992). No testimony whatever was offered going to impeach Mr. Lewis' conclusion that there had been an undercharge to the capital accounts in the amount of the journal entry.

Trucking.

Charge to operation account :

Harness and stable equipment.....	\$18,672.37	
Horse shoeing.....	67,426.13	
Renewals of horses..	105,602.70	
Provender.....	496,294.42	\$687,995.62

Transferred to capital
account by Journal

Entry :

Harness and stable equipment.....	\$3,000.00	
Horse shoeing.....	5,000.00	
Renewals of horses.	12,681.00	
Provender.....	23,000.00	\$43,681.00

(Defendant's Exhibit 1465.)

In the extensive conversion work, involving defendant's lines in all parts of Brooklyn, a very considerable amount of trucking must have been necessary. Yet none of the expenses of this trucking, save where done by third persons on specific jobs, was charged against any of the capital accounts. This appears from an inspection of plaintiff's exh. 1448, being defendant's bill of particulars (*fols.* 8167-8586), which is a copy of its books (*fol.* 6848). A journal entry of some amount had, therefore, clearly to be made; and the amount of \$43,681 fixed upon by Mr. Lewis, Mr. Bogardus and Mr. Swin, after a study of the vouchers, seems reasonable upon its face. Here, also, plaintiff introduced no proof for the purpose of impeaching the figure, but merely cross-examined Mr. Lewis upon one of the items making up the amount, as follows (*fols.* 7228-7229) :

“Q. Take that item of \$5,000, which
 “you charged to construction and credited
 “operation, that was not a definite report of

"that particular amount, was it, for horse-shoeing ?

"A. No, I think not, I think that was estimated based on my knowledge of the number of horses which were being used for construction purposes, and then an estimate made of the cost of horse-shoeing, which would be a proper charge to construction."

The method employed by Mr. Lewis was clearly reasonable and adequate, and this item of trucking should stand as unimpeached.

Legal Expenses.

Total charge to operation account, ..\$19,029.53
Transferred to capital account by
journal entry..... 7,000.00

(Def't's Exh. 1465).

All of defendant's legal expenses during the fiscal year 1892-1893 were charged to the operation account (*fols.* 4114, 7222), there being no subdivision of any of the capital accounts covering such expenses. A journal entry was necessary, therefore, to transfer to the capital accounts any legal expenses incurred which were not chargeable to operation. Evidence in some detail as to the nature and purposes of defendant's payments was produced by Mr. Hourigan, who was called as accountant on behalf of the plaintiff; and this unquestionably shows that the journal entry of \$7,000 was considerably too small. The following payments were proved to have been made :

To Messrs. Morris & Whitehouse, \$5,000.00

"For services rendered in connection
"with obtaining consents of property
"owners for new franchises, attending
"before the Town Boards of the towns of
"Flatbush and Flatlands relative to fran-
"chises in said towns; attending public

“ meetings of citizens of said towns called
 “ to consider applications for such fran-
 “ chises ; drawing various documents per-
 “ taining to such applications and fran-
 “ chises, and for advice and counsel relat-
 “ ing to various matters in connection
 “ therewith ” (*fols.* 4093, 4094).

To Street Railway Association of
 the City of New York \$1,586.89

For services rendered by Mr. Charles J.
 Bissell of Rochester, N. Y., in connection with
 looking after street railway interests in the
 legislature and before the Governor (*fols.*
 4097-4100).

To Rosendale & Hessberg of Al-
 bany, N. Y \$2,083.50

“ For consultations with Mr. Truesdale in
 “ matter of proposed amendments to rail-
 “ way law, obtaining information as to rail-
 “ road committee meetings, interviews with
 “ Mr. Bissell, interviews with various sena-
 “ tors and representatives as to Brooklyn
 “ City bill, as to Ocean Avenue bill, investi-
 “ gating status of five cent bill, interviews
 “ as to ten-hour bill, and bill forfeiting fran-
 “ chises, interviews with Mr. Bissell, Senator
 “ McCarthy and Lieut.-Gov. Sheehan in
 “ reference to bill, interview with Gov.
 “ Flower in reference to grade crossing bill,
 “ long interview with Mr. Richardson as to
 “ bill, letters to President Lewis in re-pro-
 “ posed amendments and McCarthy tax bill,
 “ interviews with Senator McCarthy, Mr.
 “ Bissell and Prof. Collin in reference to
 “ bill, preparing for Assembly R. R. meeting,
 “ interviewing private secretary Williams,
 “ Gov. Flower and Prof. Collin as to ten-
 “ hour bill, letters in reference to ten hour
 “ and other bills, and various other inter-
 “ views and letters of similar character ”
 (*fols.* 4107, 4108).

To Morris & Whitehouse..... \$4,800.00

The total amount of this bill was \$12,281.32, being \$5,000 for services in negligence cases and \$5,000 for services in franchise matters, disbursements amounting to \$2,281.32; \$4,800 was paid on account (*fol.* 4110, 4111).

Omitting all of the payments on account of the last bill of Morris & Whitehouse, and at least one-half of which is attributable to capital expenditure, there remains still \$8,670.39 which plainly is not a proper charge to operation and should have been charged to capital account—and which is \$1,670.39 more than was transferred to capital account by the journal entry.

Under sect. 45 of the Public Service Commissions Law (Cons. Laws, ch. 48), there has been established a uniform system of accounts for all street and electric railways, prescribing in detail the expenditures properly chargeable to capital or to income, respectively. This very exhaustive and now authoritative and mandatory treatise, is printed on pp. 406 to 491, both inclusive, of vol. 1 of the Annual Report of the Public Service Commission for the First District to the Legislature for the year ending December 31, 1908. Of this report the Court will take judicial notice.

Tenement House Department v. Moeschen, 179 N. Y., 325;

People ex rel. Cohen v. Butler, 125 App. Div., 384, 388;

New York Indians v. United States, 170 U. S., 1, 32.

Legal expenses of the kind here in question are, under the stringent system of accounts now prescribed by the Commission, which is designed to "show clearly and accurately * * * the pur-

pose of every expenditure" (Report Pub. Serv. Com., p. 399) and "to prevent the charging of items to wrong accounts" (Report Pub. Serv. Com., p. 401), unquestionably to be charged to capital (Report Pub. Serv. Com., p. 423):

"LAW EXPENDITURES DURING CONSTRUCTION.—Charge to this account general expenditures of the following nature, incurred in connection with the construction of a road, namely: the pay and expenses of all counsel, solicitors, and attorneys, their clerks and attendants, and expenses of their offices; printing briefs, legal forms, testimony, reports, etc.; * * * When any of the expenditures above enumerated can be charged directly to the account for which incurred, they shall be so charged and not to this account. Expenditures in connection with the acquisition of the right of way or other land shall be charged to the account (No. S-111) 'Right of Way.'"

Under "Right of Way," also a capital account (Report Pub. Serv. Com., p. 414), there is chargeable "cost of obtaining consents."

Any possible criticism from plaintiff that, though these were *capital* expenditures yet they were not *conversion* expenditures, is met by the finding of the Referee (A-1, at *fols.* 533, 534), that,

"upon the trial of this case the prescribed order of expenditure as between conversion of the railroads into an electric railroad and other construction has been ignored by both parties and the Referee; and they have assumed, for the purposes of this litigation, that payments made by defendant or by plaintiff, whether for conversion proper or for original construction, are to be treated as if all had been made in the conversion of defendant's railroads into an electric railroad."

The Referee also made the further finding (28, at fol. 343), that,

"subsequent to June, 1892, up to and including June 6th, 1893, no work of construction was done by the defendant company upon the demised railroads and properties *other than the work of converting the said railroads and properties into an electric railroad.*"

Plaintiff objects to these charges also upon the ground that they do not appear to have been incurred for work done subsequent to February 14, 1893. We beg leave, at the risk of repetition, again to point out not only the larger answer which we have at great length already given on principle to this objection, but also that, inasmuch as the portion of these amounts paying for work done prior to 14th February, 1893, were charged erroneously to operation, thus improperly diminishing the surplus, it was necessary to give defendant credit by way of correction of the former erroneous charge—not in discharge of the obligation to expend under Articles IV and V of the Lease, but to define the amount in excess of \$6,000,000 to be expended under those articles.

Advertising and Office Expenses.

Total charge to operation account	\$14,380.20
Transferred to capital account by	
journal entry	4,000.00
(Defendant's Exhibit 1465.)	

As to this entry we have detailed evidence only as to advertising expenses for the period from 14th February to 6th June, 1893, given by plaintiff's accountant (*fols.* 4146-4149). He testifies that in that period defendant's total advertising expense was \$1,179.15 (*fols.* 4146). Accepting the ac-

countant's division of the items of expense into those relating to franchises and those relating to operation, it is found that the items enumerated as belonging to the former class amount to \$888.24 (*fol.* 4147), while those assigned to operation amount to but \$290.91 (*fols.* 4148, 4149). If this testimony of plaintiff's witness be correct, then the journal entry of only \$4,000 out of the total of \$14,380.20 is apparently too small, since the construction expense shown by his calculation is over three times as great as that shown for operation. The charge made is, moreover, sustained, not only by this evidence, but by its own intrinsic reasonableness, since it includes not only the expenses of advertising, but also all additional office expenses due to conversion.

Rents.

Total charge to operation account.	\$11,693.52
Transferred to capital accounts	
by journal entry.....	1,000.00
(Defendant's Exhibit 1465.)	

Plaintiff offered no evidence concerning those items—and this notwithstanding the obvious fact that the items of rent paid were more easily ascertainable than perhaps any other of defendant's expenditures. Nor did plaintiff attempt to cross-examine Mr. Lewis on this item, after he had testified on direct-examination that all of the amounts going to make up the \$137,797.03 had been determined after careful computation (*fols.* 7126-7127). It may fairly be assumed that plaintiff's investigators found the entry to be unduly conservative.

Salaries.

Total charge to operation account.	\$74,237.87
Transferred to capital accounts by	
journal entry.....	22,700.00
(Deft's Exh. 1465.)	

There is no dispute that all salaries paid by defendant during this period of construction were charged to the operation account. This appears from Plaintiff's Exhibit 1448, being a copy of defendant's bill of particulars. It lists no salary payment except one of \$1,000 made to Mr. Bogardus, and another of \$730 to E. D. White, both made in the year 1894, for extra services rendered by them when in plaintiff's employ (*fols.* 8271, 7494, 7495). The work of conversion had begun in July, 1892 (*finding* 6 at *fol.* 324); and, prior to 6th June, 1893, there had concededly been expended therein at least the sum of \$3,262,217.31 (*supra*, p. 60; *Stipulation*, *fols.* 1232-1235) as against an expenditure for maintenance for the whole year of but \$1,055,252.03 (Defendant's Exh. 1465, p. 3184). It is certain that a considerable portion of the time of defendant's salary drawing officials must have been devoted to the construction work. The charging of a suitable proportion of their salaries to construction was plainly proper. Such a charge would now be, not only permitted, but required by the mandatory provision of the Public Service Commissioner's uniform accounts. Under the account "Miscellaneous Construction Expenditures" there are directed to be charged (*Report of Public Serv. Com.*, p. 424),

"salaries and expenses of executive and
"general officers of a road under construc-
"tion; clerks in general offices engaged on
"construction accounts or work."

The amount, \$22,700, compared with the total

of \$74,237.87, is, on its face, conservative, and was arrived at by an intelligent and careful estimate, which is described as follows:

“About the salaries of the officers, we
 “estimated the division of that; how we
 “separated them, whether it was a half or
 “a third or what, I cannot recollect, but the
 “same care was exercised in the apportion-
 “ment of the amount which should be
 “charged to construction and operation as
 “in the other matters. What that care
 “consisted of I do know; very great care.
 “We did it by carefully considering the
 “whole question of time, and it was done
 “by men who were capable of doing it (*fol.*
 “7127).

“Q. * * * You took, for instance, the
 “salaries of officers and you said here we
 “paid during the year \$74,237.87, and of
 “that we think it fair that \$22,700 should
 “be charged to construction work, because
 “they were engaged in construction work,
 “and you made it an even sum, as a matter
 “of estimate, and not because there was
 “any practical way to divide it?

“A. I think in that particular item that
 “was so, but in determining that I want to
 “say that we were conservative and kept
 “well within what we thought was fair so
 “far as that expenditure was concerned”
 (*fols.* 7226, 7227).

Plaintiff's own charge to construction of pay-
 ments for salaries in only the ten months' period
 from 6th June, 1893, to 31st March, 1894, was as
 much as \$26,854.95 (*fols.* 7591, 7616, 7617, 7729,
 7731).

Maintenance of Line Equipment—Labor.

Total charge to operation ac- count	\$6,354.71
Transferred to capital accounts by journal entry	1,500.00
(Deft's Exh. 1465, p. 3184.)	

Plaintiff offered no evidence whatever concerning this item, nor was Mr. Lewis cross-examined thereon. Toward the end of the trial, on September 30, 1908 (*fol* 7477), Mr. Lewis was asked (*fols.* 7496, 7497):

"Q. These journal entries about which
"you have spoken, are they the same journal
"entries about which you gave evidence be-
"fore, which have been testified to at great
"length here?

"A. I have been over these much more
"carefully than ever before, so that I can
"answer perhaps anything you wish con-
"cerning these journal entries, but I think
"you should be more specific as to the en-
"tries you mean, because there are a great
"many entries about which I have testified."

Plaintiff's counsel upon receiving this answer asked no further questions.

Maintenance of Building Fixtures.

Total charge to operation ac-	
count.....	\$16,020.02
Transferred to capital account	
by journal entry.....	14,206.03
(Defendant's Exhibit 1465, p. 3184).	

Defendant's buildings which had, before the elec-
trification of its railroad, been applied to the uses
of its horse car lines required alteration to suit
them for the housing of electric cars and the ma-
chinery incident to an electric railway. This
clearly was an integral part of the work of con-
version. Since, however, alterations to buildings
had as a matter of course been charged by defend-
ant's bookkeepers to Operation, the expenditure
for these was likewise so charged, and the error
corrected by this journal entry. Mr. Lewis' tes-
timony in that regard was not disputed (*fols.*

7191-7193); and the correctness of the entry is not open to question.

Light.

Total charge to operation account..	\$32,953.39
Transferred to capital account by	
journal entry.....	3,000.00
(Deft's Exh. 1465, p. 3184).	

The Referee found that the work of conversion "required day and night to cover" (finding 12, *fol.* 333, 334); and there was no criticism of this item at the trial, nor could any criticism have reasonably been attempted.

Cars and Motors.

Charge to operation :			
Maintenance of Cars..	\$55,579.46		
Maintenance of Motor			
Cars.....	32,617.50		
Maintenance of Elec-			
tric Motors.....	32,053.51	\$120,250.47	
Transferred to Capital Account by Journal			
Entry :			
Maintenance of Cars..	\$14,000.00		
Maintenance of Motor			
Cars.....	6,000.00		
Maintenance of Elec-			
tric Motors.....	7,200.00	\$27,200.00	
(Defendant's Exhibit 1465, p. 3184).			

These transfers were to cover the cost of the work of conversion done in defendant's repair shop at Myrtle avenue and Broadway (*fol.* 7214). During the electrification of the road the old horse cars were rebuilt in this shop to lengthen and strengthen them for operation by electric motors (*fol.* 7210). Details of the "repairs" made were kept by the superintendent of the repair shop (*fol.* 7211); and from these it was determined at the end of the year what portion was properly a conversion charge

(*fols.* 7211-7213). Of course, it must not be supposed that the sum of \$27,200 was sufficient for the conversion of all of defendant's horse cars into electric cars. In the cases where this work was done by men not also engaged in defendant's regular repair department, the cost was charged directly to the capital account; and the \$27,200 represents only the work of conversion done by the class of workmen first mentioned who were engaged also upon current maintenance (*fols.* 7219-7220).

GROUP II.

Credits to Passenger Earnings and Charges to Capital Accounts.

<i>To construction</i> (<i>fol.</i> 1174)	\$20,000.
<i>To real estate</i> (<i>fol.</i> 1174)	4,000.
	<hr/>
<i>Total</i>	\$24,000

Defendant's employees engaged in construction work had free transportation on defendant's lines equally with those engaged in operation; but no daily charge of the value of this transportation was entered on the books. The journal entry in question merely supplies this omission. The principle upon which it was made—that is, the propriety of charging to construction the expense of transporting employees engaged in construction work—was not questioned on the trial. In fact, similar charges made by plaintiff form a part of the judgment against defendant (plaintiff's exhibit 1162 at *fols.* 7917, 7918). As to whether the amount of \$24,000 were suitable, plaintiff offered some evidence. No doubt the charge was a rough and ready estimate made at very nearly the very time of the transaction and with the aid of the persons who had knowledge. It was quite impossible many years afterward to give the details of this relatively

small charge, to which plaintiff sought to give an importance, utterly out of proportion to the other features of the controversy, and almost preposterous.

The evidence is as follows: Some time after plaintiff took over the work of conversion it issued passes to construction employees different in color from those issued to employees engaged in operation (*fol.* 3651). During the four months from September to December, both inclusive, of 1893, there were used by employees engaged in *operation* 70,288 tickets, while those engaged in *construction* used 52,925 tickets, or almost exactly forty per cent. of the total amount (plaintiff's exhibit 1349, *fols.* 7978, 7979). The total number of employees' tickets of all kinds collected by defendant (which had not inaugurated the system of differentiation between construction and operation passes) in the year July 1, 1892, to June 6, 1893, was 687,151, having a money value of \$34,357.55 (plaintiff's exhibit 1196, *fol.* 7965). Assuming that the proportion of tickets used for conversion and operation was the same in that year as that established by the statistics for the succeeding period, that is, sixty per cent. and forty per cent., respectively, the proper amount to be charged would be \$13,743.02 (forty per cent. of \$34,357.55) instead of \$24,000,—a difference of about \$10,000. On cross-examination of Mr. Lewis, however, he justified the larger charge, pointing out that construction employees wearing badges were carried by the conductors of both companies without requiring the surrender of a ticket (*fol.* 7125).

But plaintiff sought to reduce the amount to be allowed for transportation of construction employees even below \$13,743.02 by means of an ingenious calculation devised by its accountant (*fols.* 3890–3894, 7966–7977). The proportion of construction tickets returned in the period September–December, 1893, to the total of the construction

payroll for that period was ascertained by him as 0.528 per cent. Assuming that this same relation existed between the payrolls from 14th February to 6th June, 1893, and the transportation charges for that time, a charge for construction transportation, using as a basis a tabulation of the payrolls for that period listed as such on defendant's bill of particulars, is fixed at \$1,635.60. Even this amount was not credited to defendant because of the Referee's ruling that work done prior to 6th June, 1893, was a mere gift to plaintiff. But the method by which the amount itself was determined is erroneous in as many as three particulars: (1) In estimating the payrolls of the Brooklyn City Company no account is taken of the work covered by the journal entries of the First Group, so that by applying the given percentage, the total being too small, too small a result is reached; (2) the percentage itself is too low, since no account is taken of employees traveling upon recognition of their badges; (3) no account is taken of the period prior to 14th February, 1893. Nor does it at all appear that the number of rides of employees engaged in the conversion work ought to have been uniform, or that it might not greatly vary according to the state of the work and other conditions.

The disallowance of the rides before 14th February, 1893, falls, of course, within our general argument already made. As we have shown (*supra*, p. 152), and as the Referee found (findings A-75, at *fol.* 628, and XXXVIII, at *fols.* 692-694) defendant expended subsequent to 14th February, 1893, for conversion work done after that day at least the sum of \$6,107,808.85, so that the obligation of Art. V was, on plaintiff's own proof, more than fulfilled after that date; and the remaining question merely is what additional amount was to be expended under Art. IV of the Lease in order to fulfil completely all of

defendant's obligations. To determine this, requires an ascertainment of the true surplus as of 14th February, 1893, which under Art. IV of the Lease was, together with defendant's floating debt, to be subtracted from the moneys, credits and securities on hand in order to reach the amount to to be expended under that article; and for that reason there must be a proper crediting of all amounts expended prior to that time. To limit the journal entries to work done subsequent to 14th February, 1893, would therefore be erroneous.

Even upon plaintiff's incorrect basis of calculation the total amount allowable for construction transportation would be \$5,009.95.* And that part of the entry was disallowed by the Referee as well as the rest of it. So that the question whether \$24,000 or \$13,743.02 or \$5,009.95 be the correct figure, was not determined below. The Referee rejected the item as a whole because he held that, notwithstanding the work done and money expended by defendant at plaintiff's request prior to 6th June, 1893, and of which plaintiff received and took the benefit, defendant must additionally expend the full \$6,000,000 after 6th June, 1893. In the absence of any ruling by the Referee on the evidence which might, to the extent that the evidence should be conflicting, be deemed binding here, we submit that the larger figure adopted by defendant's officers, who were acquainted with the conditions at the time, was far worthier of consideration than the artificial and ingenious calculations made by plaintiff's accountant.

NOTE.—This amount is obtained as follows: The period 14th February to 6th June contained 111 days, while the period 1st July, 1892, to 14th February, 1893, contained 229 days. The amount for the former period being given by plaintiff's accountant as \$1,635.60, the proportionate amount for the latter would be \$3,374.35, making a total of \$5,009.95.

GROUP III.

Credits to Surplus (Interest) and Charges to Capital Accounts.

Charge to Construction (fols. 1184-1187, 1191).....	\$27,619.67
Charge to Construction (fols. 1192-1197, 1199).....	20,644.14*
Charge to Construction (fols. 1201, 1202).....	163.89
Charge to Construction (fols. 1203-1205).	5,297.24
Total.....	<u>\$53,724.94</u>

In the course of conversion defendant borrowed sums of money to finance the cost of it; and the journal entries in this group were made to charge the construction account with the items of interest paid upon these loans. They are set out in detail at fols. 1184-1186, 1192-1197, 1201, 1202, and 1203-1205. From these details it appears that \$27,619.67 was paid in interest prior to 14th February, 1893 (fols. 1184-1186), while the remainder, viz., \$26,105.27, was expended after that date. No dispute is made that these sums were actually paid for moneys actually borrowed in the course and for the purpose of the conversion work. And the propriety of their charge to defendant's capital account, if it need authority, is established by the rule laid down by the Public Service Commission for the First District in the Report cited above (Annual Report, Pub. Serv. Com., 1908, vol. 1, p. 423):

"Interest during Construction: Charge
" to this account the interest accrued upon

* The actual amount expended was \$3,000 more than the \$20,644.14 transferred by the journal entry, the smaller figure resulting from a subtraction on defendant's books of \$1,500 actually paid as a discount, instead of an addition of that sum (fols. 8282, 8290). The error (although corrected on the bill of particulars at fol. 8290) was never corrected on the Brooklyn City books (fol. 7240); and plaintiff received the benefit of it in the Tripartite adjustment.

“ all moneys (and credits available upon demand) acquired for use in connection with the construction and equipment of the property from the time of such acquisition until the construction is ready for use.”

The sum of \$27,619.67 which is undisputed, should be credited to defendant, as it was for the Tripartite Agreement, to determine defendant's surplus as of 14th February, 1893, and thus to fix the amount of its obligation to expend under Art. IV of the Lease ; and that amount, with the other amounts already discussed, should, therefore, be subtracted from the sum calculated *supra* p. 83 as measuring defendant's obligation under that article.

The remaining items, amounting to \$26,105.27, while all paid subsequent to 6th June, 1893, referred in part to loans made, and, in consequence, to interest accrued, prior to that date, though after 14th February, 1893. A list of these loans is in evidence showing the total amount borrowed to have been \$2,730,000 (*fols.* 8953-8958); and the Referee has found that all of such loans were made for construction purposes (finding 35 at *fol.* 359). The different items of interest paid are likewise set out in full in the record at *fols.* 1192-1197, 1201, 1203-1205 ; and there is no dispute that those items of interest were actually paid by plaintiff upon these construction loans. The Referee at plaintiff's request, however, out of the full amount of \$26,105.27, allowed to defendant only \$4,132.05 (finding XXXVIII at *fol.* 693). The request so adopted by the Referee was based upon the calculations of plaintiff's accountant, Hourigan, to the effect that, if defendant had returned borrowed money immediately—that is to say on the very day that it received proceeds sufficient to do so from the sale of stock and bonds—the interest accrued after 6th June, 1893, would have amounted to no more than such sum of \$4,132.05. This testimony omits to give credit for the interest paid subsequent to 6th June, 1893, but which

accrued before that date, and thus arbitrarily leaves out of account the sum of \$2,316.67 (*fol.* 8953, the interest being calculated at the then current rate of six per cent). The substantial vice of the accountant's testimony, which was ratified by the finding of the Referee, lies, however, not so much in the exclusion of the interest on construction loans accruing in the period 14th February-6th June, 1893 (for it was consistently, though most wrongly, the position of plaintiff that all of the expenditures during this period came as a mere gift to it), as in the assumption that, irrespective of what was actually in good faith paid by defendant to procure money to meet the cost incurred by plaintiff in conversion, the sums so paid should not be allowed in so far as the loans were not repaid immediately upon the receipt of sufficient moneys from other sources.

The imputation to defendant of wastefulness in managing its own financial business is quite gratuitous after the lapse of all these years. Even if defendant's officers had had no other work on hand than merely to pay out to plaintiff the cost of conversion, we submit plaintiff could not as matter of law attack these payments made, perhaps not of strict necessity, but in good faith and for loans the proceeds of which had undeniably been applied to paying the cost of conversion. But, under the facts as they actually were, plaintiff's claim as to this item is bare of any vestige of equity. Plaintiff's directors and officers until 24th January, 1894, were the same men who originally had been elected to their positions to act merely as dummies for Hollins & Company (*fols.* 8069-8089, 5665-5668). They of course did no work. So that all the burden of carrying on the heavy work of conversion and also the operation of the railroads fell upon and was assumed by Mr. Lewis and the other officers of the lessor Company (*fols.* 5465-

5468); in fact, so serious and arduous were the duties imposed on Mr. Lewis that a breakdown in his health compelled him to go to the South in the winter of 1893-1894 (*fols.* 5315, 5466, 5467).

We submit that to expect defendant's officers, while they were bending all their efforts to the completion of the conversion work for plaintiff, to return borrowed money on precisely the day when, and to the extent that, other money should come to defendant's treasury, and to charge defendant for the supposed neglect of its officers in failing to do this, is, under the circumstances we have stated, most unreasonable. And beyond this it should also be considered that the year 1893 was the year of the panic; that it must have been important to have on hand not only enough funds to meet obligations which had matured, but likewise some reserve for the payment of future conversion expenses. The repayment of borrowed money on the moment that proceeds from the newly issued stocks and bonds were received, so as to leave defendant without any cash funds whatever, would have been a gross financial mismanagement. And further, the payments for stock were not made on a single day, but extended over a period of several months (*fol.* 8960); and it was not, therefore, possible to gauge exactly what moneys could be obtained from that source in the immediate future. The retention of money borrowed, even when there were enough funds on hand to pay existing indebtedness, was probably a policy deliberately and wisely adopted by defendant's officers. It was a portion of the whole machinery to carry on the conversion; the expense entailed by it was a part of the cost of conversion.

GROUP IV.

Credit from surplus (dividends) to construction.

Charge to construction (fol. 1175)..\$90,000.00

In January, 1893, there was issued \$3,000,000 of the new \$6,000,000 of stock authorized in July, 1892 (*fols.* 851-854, 859-862), the proceeds from the sale of which were to be devoted to the payment of the cost of the conversion (*fol.* 849). Quarterly dividends of two per cent. were paid by defendant on 28th March, 1893 (*fol.* 3936) and on 30th June, 1893 (*fol.* 3934) so that upon this additional \$3,000,000 there was on these two occasions paid \$120,000, which was charged against defendant's surplus. The journal entry of \$90,000 here under discussion formed a part of this sum, and is explained as follows by the minutes of the meeting of defendant's Executive Committee, which was held 27th September, 1893:

"The Secretary further reported that the
"\$120,000 being a dividend on \$3,000,000 of
"the capital stock paid" (*i. e.*, issued) "on
"January 3d, 1893, had been charged to
"surplus account, but inasmuch as this
"stock was issued expressly for the purpose
"of securing money to construct, or recon-
"struction of the road, he suggested that a
"portion or all of this money should be
"charged against the construction account,
"and the surplus account credited with
"same. Upon investigation the committee
"decided that the surplus account should be
"credited and the construction account deb-
"ited with \$90,000 at" (*i. e.*, in accordance
with) "current rate of interest for this time,
"viz.: 3 per cent., and the matter was
"referred to the full Board for approval"
(*fols.* 947, 948).

On the following day, 28th September, 1893, defendant's Board of Directors by resolution duly approved this recommendation of the Executive Committee (*fols.* 912, 913).

We concede that dividends are payable out of surplus and not out of capital. But that is not the question here. For here the dividends *were* paid out of surplus. The question is whether the payment—from whatever fund defendant paid it—were made for purposes of conversion, and whether it would have been made but for the conversion work. The payment belongs to a peculiar and exceptional class. Defendant's new stock had been issued for immediate use of the money in conversion. The profits of the horse railroad were such as to entitle those shareholders who had invested in the horse railroad to the usual quarterly dividends; but this could not be declared without equally favoring the shareholders whose moneys were applied to conversion. The expense thus incurred was, by those who made the adjustment of the Tripartite Agreement, fairly regarded as an expense of conversion, equally with interest payments upon construction loans or upon bonds so long as the period of construction continues, both of which are authoritatively so regarded. In principle there was no difference whatever.

GROUP V.

Credits to supplies and charges to capital accounts.

<i>To Real Estate (fol. 1180).....</i>	<i>\$80,000.00</i>
<i>To Equipment (fols. 1212-1221). . .</i>	<i>150,245.79</i>
<i>To Construction (fols. 1176-1177) . .</i>	<i>134,775.16</i>
<i>Total.....</i>	<i>\$365,020.95</i>

Defendant's account of supplies, from which these transfers were made to the various construction accounts, was neither a construction nor an operation account. On 1st July, 1890, it was found by inventory that defendant had then on hand supplies of the cost value of \$105,243.46 (*fols.* 3910, 3911); and the "supplies account" was then begun with a charge of that amount (*fol.* 3911). Thereafter there was charged to this account as paid for, the cost of all materials purchased, of whatever kind they might be and for whatever purposes they might be designated, which were deposited in defendant's storehouse. At the end of each month the storekeeper made a report of the materials taken out of the storehouse and of the use to which they had been put; and they were then credited to the supplies account and charged to the appropriate operation or construction account, depending upon their use as reported by the storekeeper (*fols.* 3896, 6929-6931, 7030). The meaning of the journal entries in question transferring charges from the supplies account to the capital account is, therefore, that supplies which had been purchased in the amounts of the respective entries had been used in and become part of defendant's real estate, equipment and road-bed, respectively. The only question to be determined is, therefore, whether these entries accurately reflect the facts; and as to this we shall consider each entry by itself:

(a) *Charge to real estate \$80,000*; Plaintiff concedes the correctness of this entry, and the Referee has made findings completely covering it (findings A-34, A-35, at *fols.* 558, 559). It represents payments made on 8th July and 21st August, 1893, to the General Electric Company for generators which were ultimately used in conversion. Of these, generators of the value of \$13,542.10 were furnished

after 6th June, 1893 (finding A-35, at *fol.* 559); and this sum is credited to defendant by the Referee in determining the amount expended by defendant for conversion after that date (finding XXXVIII, at *fol.* 693). The remainder were furnished, to the value of \$42,335.60, prior to 14th February, 1893, and \$24,122.30 between 14th February and 6th June, 1893 (finding A-35, at *fol.* 559). These sums are included in the Referee's finding of the cost of the railroad on those dates respectively (finding A-75, at *fol.* 628). It is clear, therefore, that this journal entry caused no change whatever in the computation of surplus and amount to be expended under Art. IV which we have given in accordance with the figures found by the Referee (*supra*, pp. 68, 69).

(b) *Charge to equipment \$150,245.79* : This amount, as appears from the journal entry itself (*fol.* 1183), refers to certain unmounted materials listed in the inventory of defendant's personal property which was made as of 6th June, 1893, and which were, as the Referee has found, delivered to plaintiff on that day (finding 21 at *fol.* 340). An itemized schedule of them is printed at *fols.* 1214-1220. Under Art. XI of the Lease plaintiff was to purchase from defendant at their cost price "all supplies and materials then on hand for use in connection with the construction, maintenance or operation of said railroad" (*fol.* 79). The Lease, however, nowhere contains an express definition of the words "supplies and materials." Under the definition adopted by defendant in its bookkeeping—that anything deposited in its storehouses constituted "supplies" until either consumed in operation or mounted in construction—these materials having been found in defendant's car and motor shops and consisting of unmounted motor and equipment parts (*fols.*

1214, 1215, 1218), were clearly to be paid for by plaintiff upon taking possession of them. But this bookkeeping definition was deemed, contemporaneously by the parties, and likewise by the Referee upon the trial, not to obtain, because under Art. I of the Lease were demised

"Also all horses, harness, cars, locomotives, engines, tools, implements, machinery, railroad equipments, power stations, electrical appliances and equipments, stable equipments and fixtures, office furniture and office fixtures, and all other property of whatsoever kind or nature except money, credits and securities, acquired, owned or possessed by said lessor for use in the construction, maintenance or operation of said demised railroad or railroads and properties" (*fol.* 63).

The equipment parts in question fell within these categories of capital assets (finding XXXVI at *fol.* 689-690; finding 21 at *fol.* 340). Consequently, when the Lease took effect, they became under it a part of the capital equipment of the railroad; and the journal entry was of necessity made to indicate this transfer to capital account. There is no evidence in the record tending to show when these particular materials were purchased; nor could there well be such evidence. But obviously those purchased prior to 14th February, 1893, must be taken into consideration in determining the surplus as of that day, thus affecting the amount to be expended under Art. IV of the Lease, while those received thereafter go in discharge of defendant's obligation to expend under Arts. IV and V. The mere accident that these materials were, under defendant's system of bookkeeping, classed as "supplies" can certainly not change the fact that plaintiff received them as part of the capital of the railroad, or entitle plaintiff to receive them as a mere gift.

(c) *Charge to construction, \$134,775.16:* The

cost of materials was not charged against the supplies account upon defendant's books until the materials had been paid for (*fol.* 3896, 3898, 6925, 6926, 6930, 6931); and the materials on hand in defendant's storehouses on 6th June, 1893, when plaintiff assumed possession of them, are therefore not shown by the debit balance in the supplies account as of that day, which was only about \$187,144.68 (*fol.* 3904). When, however, all had been paid for, the supplies account showed a debit balance (disregarding certain credits meanwhile made to the account) of \$616,356.54* (*fol.* 3904-3906). But the inventory of 6th June, 1893, supplemented by the evidence given on the trial, showed materials on hand of the value of only \$481,581.38 comprising \$251,335.59 of materials paid for by plaintiff as technically "supplies" under the Lease (*fol.* 3904), \$150,245.79 of materials on hand in defendant's storehouses, but not technically "supplies" under the Lease (*fol.* 3910, 340, 1212, 1214-1221), and generators worth \$80,000 (*fol.* 3907). It appears, therefore, that on 6th June, 1893, defendant had paid out \$134,775.10 for materials which could not then be traced. The explanation of this deficit was given in the testimony of Mr. Forsdick, the accountant, as follows:

"It is generally the case in going over
 "the books of a concern of this kind where
 "an inventory of supplies has not been
 "taken for some time, you find that the in-
 "ventory does not equal the amount charged
 "in supply account.

"The superintendents and others in charge
 "of the supply department sometimes neg-
 "lect to report the use of supplies, but they
 "will make reports long after supplies have
 "been used, and the bookkeeping depart-
 "ments also at times neglect to make proper
 "entries. That has happened, and does
 "happen frequently" (*fol.* 7004, 7005).

* This amount is found by adding to the balance, \$607,280.22, shown as of 30th September, 1893 (*fol.* 3904), the subsequent charges of \$319.41, \$483.40, \$8.12 and \$8,265.39 (*fol.* 3905-3906).

The meaning of the journal entry is that these supplies, withdrawn from the storehouse without any record being made, were all believed by the parties, dealing with the matter when it was fresh in mind, to have been used in construction or conversion. There is no evidence in the case which tends against the correctness of this conclusion. Both Mr. Swin, who made the entry, and Mr. Bogardus, at whose direction it was made (*fols.* 6878, 6879) had died at the time of the trial, and in the discussion of this item we are remitted to inferences and side-lights drawn from other evidence. Plaintiff, cross-examining defendant's accountant, showed that, in the month of July, 1892, the supplies consumed in operation amounted to \$52,702.33, while those consumed in construction and conversion amounted to \$85,462.85, and that the same figures for December, 1892, were, for operation \$55,813.05, and for construction and conversion \$79,585.37 (*fols.* 7032, 7033*). Assuming those months to be typical, about sixty per cent. of supplies were used in construction and conversion as against forty per cent. in operation. From this plaintiff would infer that the supplies, the consumption of which was not recorded and which amounted in all to \$134,775.16, were used in operation and construction respectively in the same proportions. So that only sixty per cent. of that figure, or \$80,865.10, should have been transferred to the construction account. And we concede that Thompson, the railroad accountant, who had, previous to 1893, been defendant's secretary and treasurer (*fol.* 7041) and who was defendant's witness, testified on cross-examination that this method of proportioning was one which he had himself adopted in other instances (*fol.* 7327). It is, however, apparent that at least

* The amounts here given are additions of the items separately testified to by the accountant.

the greater part of the entry is perfectly proper, and that the disallowance of the whole was error. Defendant has been unfortunate in that both Mr. Bogardus and Mr. Swin, who had direct knowledge of the entries and the facts bearing upon them, had died at the time of the trial. But clearly, as it is undisputed that the \$134,775.16 was actually expended for supplies, and since it cannot be presumed that they were stolen, and consequently must have been used on the railroad, the entry upon the basis of the figures put in the case by plaintiff's counsel himself, can be attacked only to the extent of forty per cent. thereof, or \$53,910.06.

This is a case where, in the absence of evidence of bad faith or mistake the decision of defendant's accounting officers at the time, approved by plaintiff's officers and directors, should not be set aside because after the lapse of many years, a detailed and complete explanation cannot be given.

Finally, we submit, as to these details of the "journal entries," that they are shown to have been substantially correct and just, and that, so far as concerns the relatively small part of them as to which full and detailed corroboration has not been produced, there is no reason to doubt the good faith of those who, on defendant's side, made the entries, when the facts were fresh in mind, or of those who, on plaintiff's side, approved them for the purposes of the Tripartite adjustment.

EIGHTH PRINCIPAL QUESTION.

Plaintiff's right to recover for moneys expended not by itself, but by the Disbursing Committee.

The allegation of the complaint was (*fols.* 29, 30) that

“ Prior to September 30, 1894, the *plaintiff had expended* out of its own funds more than two million dollars (\$2,000,000) in payments of the cost of converting the said railroads, * * * and the plaintiff had from time to time, at various times prior to September 30, 1894, demanded and requested the payment by the defendant to the plaintiff of the said sum of two million dollars (\$2,000,000).”

The corresponding statement in the Referee's decision is (Finding Thirteenth at *fol.* 741) :

“ That after June 6th, 1893, and before September 1st, 1894, *the plaintiff expended in conversion* * * * more than \$1,740,258.38 ;”

and the Referee's conclusion thereupon (Finding Fourteenth at *fols.* 741, 742) was

“ That there is a balance due and owing * * * from the said defendant to the plaintiff of \$1,740,258.38 with interest thereon from September 1st, 1894.”

The appellant submits that, upon the undisputed evidence, and upon other findings of the Referee, the fact is not open to controversy that, as to more than \$700,000 out of the \$1,740,258.38, the payment of cost of conversion was not made by plaintiff or out of its money, but by the Disbursing Com-

mittee out of moneys contributed by persons other than plaintiff; and that plaintiff's recovery, therefore, was erroneous to that extent. And the appellant submits further that the payments by the Disbursing Committee were made under and pursuant to the Tripartite Agreement and from funds raised under that agreement; and that, if plaintiff accept benefits under that agreement, plaintiff cannot repudiate it when defendant invokes its protection.

Exceptions specially raising the Question.

The exceptions 9th and 10th at *fol.* 766 to Findings Thirteenth and Fourteenth at *fols.* 741, 742, and the exception at *fol.* 817 to the Referee's refusal to make conclusion A-2 at *fol.* 651 directly present the question. So do the exceptions at *fols.* 767, 768 to the Fifth and Sixth Conclusions of the Referee at *fols.* 744, 745.

The Facts.

Finding A-42 made at plaintiff's request (*fols.* 567-573) stated that

" Plaintiff's payments (made by plaintiff
 " directly or by the Disbursing Committee)
 " for construction and conversion prior to
 " October 26th, 1894, for part of which
 " plaintiff has its recovery, are computed as
 " follows * * * :

" Direct payments by	
" plaintiff to October	
" 26, 1894 * * *	\$1,497,502.97
" Disbursing Commit-	
" tee's payments to	
" October 26, 1894,"	
aggregating	862,964.75
	<hr/>
" Total	\$2,360,467.72

" Less credits on account	
" of old material to	
" October 26, 1894...	206,019.87
	<hr/>
	\$2,154,447.87
" Less advances by de-	
" fendant.....	286,166.35
	<hr/>
	\$1,868,287.52
" Amount of principal	
" award to plaintiff..	\$1,740,258.38."

The credits of \$206,019.87 and \$286,166.35, together amounting to \$492,186.22, were in effect direct repayments by defendant to plaintiff itself, so that such payments by plaintiff prior to 26th October, 1894, were in the net only \$1,005,316.75 (\$1,497,502.97 less \$492,186.32). Adding the \$862,964.75 contributed by the Disbursing Committee, we have the \$1,868,287.52, which includes the \$1,740,258.38, the principal of the recovery. The Disbursing Committee payments forming part of the \$1,868,287.52, were the last made. Conceding for simplicity that the excess of the \$1,868,287.52 over the \$1,740,258.38 was part of the Committee's payments, and so deducting it from the \$862,964.75, we have the net payment to conversion by the Committee to have been at least \$734,935.61. The statement of Finding A-42 (*fols.* 567-573) made by the plaintiff itself and adopted by the Referee, therefore shows that, notwithstanding other findings, the fact is that plaintiff's own payments support only \$1,005,316.75 of the recovery, and the remaining part—that is to say, \$734,935.61—has as its foundation payments made by the Disbursing Committee.

In behalf of the appellant we again invoke the rule that, on an appeal, the appellant is entitled to

the interpretation of inconsistent findings of fact most favorable to him.

Vide discussion at pp. 52, 53 *supra*, citing

Stokes v. Stokes, 198 N. Y., 301, 307.

Whalen v. Stuart, 194 N. Y., 495, 502.

Plaintiff's finding A-42, partly quoted above, expressly refers to, and recites the Disbursing Committee's certificates A, B, C, D, E, F, G, H, I, K and L, dated from 27th August, 1894 to 26th October, 1894 (*fols.* 568-570). The certificates are in identical form, being plaintiff's exhibits 1119 to 1143, both inclusive (*fols.* 7738-7758c of p. 2586k). Each of them begins with a certificate signed "M. J. Starrett, Engineer, Brooklyn Heights R. R. Co., Long Island Traction Co." and verified by his affidavit, to the effect that Mr. Starrett, describing himself as—

"Engineer in charge of the work of construction, conversion and equipment of the railroads of The Brooklyn City Railroad Company held under lease dated February 14, 1894 (*sic*),"

certifies that—

"the work, material and equipment mentioned in the annexed vouchers * * * have been done and actually used in the construction, conversion and equipment of said railroad, and that the work so done, materials so used and equipment so furnished are equal in value and cost to the contract prices therefor being the amount called for in said several vouchers, and are equal in value in the aggregate to the amount of \$ hereby called for by this certificate."

There then follows a written approval of the Starrett certificate, signed by the presidents of the

Brooklyn City Railroad Company, the Brooklyn Heights Railroad Company and the Long Island Traction Company. We ask the Court to refer to the synopsis we have already given (*supra*, pp. 43, 44) of the provisions of the Tripartite Agreement relating to the Disbursing Committee. The Court will find that the Committee, although provided for in the trust indenture or mortgage of 1st August, 1894, made by the plaintiff and the Traction Company to the New York Guaranty and Indemnity Company was reconstituted and given a further charter of powers by the Tripartite Agreement. The three parties to the latter instrument—that is to say, the plaintiff, the defendant and the Traction Company, which owned all the shares of stock of plaintiff—agreed that the moneys raised under the agreement, and for which the joint notes of the plaintiff and the Traction Company secured by the mortgage to the Guaranty Company were to be given,—should be received and disbursed by the Disbursing Committee. This provision was made applicable to all such moneys, and whether they were contributed by the defendant or by outside subscribers to the series of joint notes of the plaintiff and the Traction Company secured by the Guaranty Company mortgage. The moneys thus received by the Disbursing Committee did not, therefore, come from the plaintiff in any other sense than that, for the moneys thus received by the Disbursing Committee from defendant and other outside lenders, the joint notes of the plaintiff and the Traction Company were given.

By the agreement of 7th April, 1893, between the Traction Company and plaintiff (plaintiff's exhibit 7, *fols.* 7644–7649), it had been recited that the Traction Company was then “about to become the owner of all the capital stock” of plaintiff (*fol.* 7644), and the plaintiff, in considera-

tion of the provision by the Traction Company of the \$4,000,000 guaranty fund required by the Lease of 14th February, 1893—

“ agreed that the entire net income of the
 “ party hereto of the second part,” (the
 plaintiff) “ after discharging its obligations
 “ under the said lease and remaining after
 “ paying an annual dividend of ten per
 “ centum upon its own capital stock, shall
 “ belong, and be paid over to the party hereto
 “ of the first part”—the Traction Company
 (fols. 7647, 7648).

There followed (as we have stated in the synopsis, *supra*, at pp. 245–250 under the *Fifth Principal Question*) the making, in August, 1894, of the Tripartite Agreement by plaintiff and the Traction Company with the defendant; the issuance of the notes provided for in that agreement; the securing of such notes by the mortgage of 1st August, 1894, made by plaintiff and the Traction Company to the New York Guaranty and Indemnity Company—the property mortgaged thereunder being in large, if not chief, part the property of the Traction Company; the decree of foreclosure of the mortgage in October, 1895; the acquisition by the Brooklyn Rapid Transit Company, through the sale thereunder, of the property of the Traction Company and plaintiff which had been pledged under the mortgage; and the Rapid Transit Company’s acquisition of other rights of the Traction Company.

There was then made the agreement of 24th March, 1896, between the Rapid Transit Company and the plaintiff. The full text of this instrument is in the Referee’s finding 84 at fols. 489–506. It recites the issuance of the collateral trust notes under the Guaranty Company mortgage and their joint execution by plaintiff and the Traction Company; the securing of them by assets of the plain-

tiff and of the Traction Company ; the foreclosure sale ; the succession of the Rapid Transit Company—

“ to all rights and claims which the said
“ Traction Company may have had against
“ the said Heights Company by reason of
“ the property of the Traction Company
“ being sold to pay such obligations ” (*fol.*
493) ;

that—

“ said obligations were paid in part by the
“ property of the Traction Company, and
“ that the Heights Company is justly and
“ equitably indebted to the Transit Com-
“ pany, in an amount equal to the propor-
“ tion of said indebtedness, which may fairly
“ be deemed to have been paid by such sale
“ of property of the Traction Company ”
(*fols.* 493, 494) ;

and, finally, that the Transit Company—

“ demands of the Heights Company a set-
“ tlement and adjustment of the amount of
“ such claim and demand ” (*fol.* 494).

After such recitals the agreement provided that the plaintiff should pay to the Transit Company—

“ interest semi-annually at the rate of
“ five per cent. (5%) per annum upon such
“ total amount of such obligations as is esti-
“ mated to have been expended for construc-
“ tion and betterments, which amount is
“ hereby fixed and agreed upon as being the
“ sum of \$2,237,897.35 on January 1, 1896,
“ said interest to be paid until the termina-
“ tion of the lease by the Brooklyn City
“ Railroad Company of its railroad system
“ to the Brooklyn Heights Railroad Company
“ which lease bears date February 14, 1893 ;
“ and the Transit Company releases the
“ Heights Company from any obligation to
“ pay any part of such principal amount,

“ and accepts such agreement to pay interest
 “ in full satisfaction of all its claims and de-
 “ mands by reason of the transactions here-
 “ inbefore set forth ” (*fols.* 495, 496).

There further followed the provision, already fully discussed under the *Fifth Principal Question* (*supra*, pp. 250-251), for the proper entry by the plaintiff in its books recognizing the ownership of the Transit Company in the claim of plaintiff against the defendant for construction payments. On 20th April, 1896, and pursuant to the agreement last mentioned, the plaintiff made such entry in its books, signed by its counsel, auditor and chief accountant. The entry, of which the full text is given in finding 86 at *fols.* 508-516, stated that the collateral trust notes issued jointly by the Traction Company and plaintiff in the sum of \$1,875,000, the joint receiver's certificates in the sum of \$350,000 and the joint promissory notes in the sum of \$606,462.33 (the last mentioned notes including the unpaid part of the note of \$308,340.35 given to the defendant and the further notes for \$250,000 and \$100,000 also given to the defendant) had been “ paid by foreclosure “ sale in one parcel of the property so pledged “ * * *.” It was then certified by the entry as follows (*fol.* 511):

“ These obligations are therefore charged
 “ off the books of the Brooklyn Heights
 “ Railroad Company by a debit entry to
 “ Bills Payable, the Brooklyn Rapid Transit
 “ Company by such sale and transfer be-
 “ coming the owner of all the property of
 “ the Long Island Traction Company, at the
 “ time of such sale including all claims of
 “ the Long Island Traction Company against
 “ the Brooklyn Heights Railroad Company,
 “ on account of the property of the Traction
 “ Company so sold for the benefit of the
 “ Heights Company or otherwise. * * *
 “ The Brooklyn Rapid Transit Company is

*Plff not entitled to recover payments not 345
made by itself.*

“credited, under date of January 1, 1896,
“with \$2,237,897.35, which, under the above
“agreement” (of 24th March, 1896), “is the
“sum fixed and agreed upon as the total
“amount of the Construction and Better-
“ment Account of the Brooklyn Heights
“Railroad Company against the Brooklyn
“City Railroad Company at the above
“named date.”

POINT 1. [*Eighth Principal Question.*]

**The plaintiff, not itself having paid the \$734,-
935.61 which was advanced by the Disbursing
Committee for the conversion work and is in-
cluded in the plaintiff's recovery of \$1,740,-
058.38, was not entitled to the corresponding
part of its recovery.**

Upon the record it is open to no dispute that the \$862,964.75 included in the computation by which, as set forth in plaintiff's finding A-42 (*fols.* 567-573), the amount of plaintiff's recovery was reached, was money which never came into the hands of the plaintiff and was never paid out by the plaintiff. We can imagine no theory upon which the plaintiff has recovered the portion of the damages awarded corresponding to that sum, except that, since the notes which produced the money were the joint notes of the plaintiff and the Traction Company issued to those who paid the money to the Disbursing Committee, the payment out by that Committee may have been deemed to be the plaintiff's payment. But, upon that reasoning, and if the Disbursing Committee be deemed an agent for plaintiff and the Traction Company, the payments by the Committee can no more be deemed to have been the plaintiff's payment than to have been the Traction Company's payments. Thus far

the Traction Company appears to have at least as much of a right to a recovery against the defendant as the plaintiff. For, even upon that reasoning, it does not appear how much of the moneys so advanced was in effect paid by plaintiff. Very certainly the burden of proof was upon plaintiff. If it wished, as its complaint proposed, to recover from the defendant the moneys which it had paid out, it was bound to show how it had paid the moneys, and what was their amount.

If the plaintiff in its complaint had alleged the facts as they were—that is to say, had alleged the establishment of the Disbursing Committee, the receipt by it of moneys raised on the joint notes and the payment of those notes through a foreclosure sale of properties of the Traction Company and the plaintiff, and had alleged nothing more—the question might have been raised by defendant by answer or demurrer, whether plaintiff could recover without showing an assignment to defendant of the Traction Company's interest, or identifying plaintiff's own interest, or without making the Traction Company a party. But no cause of action was alleged or proved in favor of the Traction Company against defendant; nor is there any recovery for any such cause of action; nor was the Traction Company a party. Plaintiff asked a recovery solely on the ground of its own payments for construction; and solely on that ground did the Referee make his decision. Surely, however, the plaintiff can, in this action at law, recover only in its own right. And it has established no right to the recovery of any specific part of the \$862,964.75.

The foreclosure of the mortgage of 1st August, 1894, made by plaintiff and the Traction Company to the Guaranty Company had included, *first*, the 2,000 shares of stock of the plaintiff belonging solely to the Traction Company; *secondly*, all interest of the Traction Company as sole owner of

*Plff. not entitled to recover payments not 347
made by itself.*

the capital stock of the Brooklyn, Queens County and Suburban Railroad Company; *thirdly*, all net profits—

“ in anywise derived or receivable by said
“ The Brooklyn Heights Railroad Company
“ as lessee of the railroad and other prop-
“ erty of The Brooklyn City Railroad Com-
“ pany, under the certain lease of February
“ 14th, 1893, * * * including * * *
“ all the present and future right * * *
“ of the Brooklyn Heights Railroad Com-
“ pany and the Long Island Traction Com-
“ pany in, to and in anywise concerning
“ the income and principal and every part
“ thereof of a certain Guaranty Fund of
“ \$4,000,000,”

such profits belonging not only to plaintiff, the “Heights” Company, but also—under the agreement of 7th April, 1893, quoted above (pp. 341, 342)—belonging to the Traction Company; and *fourthly*, the interest of plaintiff in the cost of construction, etc., paid for out of its own funds upon the defendant’s railroads.

Finding 53 as to the mortgage at *fols.*
389–393 ;

Finding 79, which gives the full text of the foreclosure decree including a description of the mortgaged property at *fols.* 428–477.

It is plain, therefore, that the mortgaged property was in very large part, if not far the greater part, the property of the Traction Company. The property sold upon the foreclosure in lump for \$5,500,000 (*fol.* 8913). Thereupon, by the agreement of March, 1896, it was stipulated—arbitrarily, so far as appears—between the plaintiff and the Brooklyn Rapid Transit Company (the successor to the ownership of the Traction Company) that

the obligation of the plaintiff to the Transit Company by reason of the application under foreclosure of the Traction Company's property to the payment of the joint notes of the plaintiff and the Traction Company should be commuted and discharged by the new obligation created by the agreement of March, 1896, on the part of the plaintiff to pay the Transit Company interest on the sum of \$2,237,897.35, from 1st January, 1896, to the termination of the Lease of 14th February, 1898.

Thus far the Court will perceive that, even between the plaintiff and the Traction Company or the Rapid Transit Company, there has, in no manner or degree whatsoever, been ascertained, fixed or determined between the parties the actual extent, if any, to which, by the sale of property belonging to the plaintiff or in any other way, the plaintiff had in effect itself paid the debt owing the note holders under the Guaranty mortgage, whose money had gone to, and been expended by, the Disbursing Committee.

While the facts as found by the Referee make it possible—or perhaps probable—that, in such indirect way, the plaintiff did itself pay some part of those moneys, there is before this Court no ascertainment or determination, whether by the Referee or otherwise, as to what amount the plaintiff itself had thus, in supposititious effect, paid. Or, if, among the findings of the Referee, there be a finding which can be interpreted to assert that the amount paid by the plaintiff was \$862,964.75, that finding is absolutely without evidence to sustain it, is inconsistent with the other findings of the Referee and is in complete defiance of the undisputed facts.

POINT II. [*Eighth Principal Question.*]

The plaintiff, seeking to avail itself in this action of the payments made by the Disbursing Committee of moneys raised under the Tripartite Agreement, affirms that agreement, and under it is barred from any recovery hereby.

This, again, is a case where argument is unnecessary in addition to the statement of facts. The Disbursing Committee acted under the Tripartite Agreement, to which the Traction Company and the defendant were parties as well as the plaintiff; and the Committee disbursed moneys derived under that Agreement (finding A-20 at *fols.* 549-550). The defendant paid under the agreement the sum of \$350,000 (finding 63, *fols.* 407, 408); and the moneys received from the outside subscribers to the collateral trust notes secured by the mortgage of 1st August, 1894, were, under the Tripartite Agreement, paid to the Disbursing Committee. It would seem to be clear, and quite beyond the necessity of further reasoning, that, if the plaintiff is to be credited with the \$862,964.75 received and paid out by the Disbursing Committee, then it must stand by the Tripartite Agreement, even though that agreement, not being avoided, bars its recovery. Or—to put the proposition in the other way—if the plaintiff is to be permitted to repudiate the Tripartite Agreement, then it cannot recover, as for moneys paid out by itself, for moneys which were received by and paid out under the provisions of that agreement.

Barr v. N. Y., L. E. & W. R. Co., 125 N. Y., 263. By GRAY, J., at pp. 276-277:

“I think it quite incompatible with the
“principles upon which equity proceeds to
“hold and use property, the only right to

“ which is derived through a contract of
 “ lease, and to refuse payment of a part of
 “ the rent stipulated in the contract on the
 “ ground of the existence of fraud in its
 “ procurement. The contract was not sev-
 “ erable, nor the consideration apportion-
 “ able. If it was bad for some fraud in the
 “ agreement, then it was voidable as a
 “ whole. The Erie Company, or its succes-
 “ sor, could not adopt in part and repudiate
 “ in part.”

Steinway v. Steinway, 2 App. Div., 301, by BAR-
 RETT, J., at p. 306 :

“ A *cestui que trust* is not, any more than
 “ another, exempted from the operation of
 “ those salutary rules of law which prohibit
 “ one from taking inconsistent positions
 “ with regard to a contract. If he decides
 “ to disaffirm an agreement made by the
 “ trustee, he must restore what he has re-
 “ ceived under it (*Duncomb v. N. Y., H.*
 “ *& N. R. R. Co.*, 84 N. Y., 190 ; *Barr v.*
 “ *N. Y., L. E. & W. R. R. Co.*, 125 *id.*,
 “ 263).”

Wright v. Smith, 13 App. Div., 536. By
 HARDIN, P. J., at p. 541 :

“ It is not proposed by the plaintiff to put
 “ the defendant in the position he was in
 “ before the plaintiff's inducement had been
 “ held out to him to erect the building in
 “ accordance with the provisions of the
 “ agreement. The plaintiff, if he would re-
 “ scind the contract which he has entered
 “ into, should do so by a restoration of the
 “ defendant to the position which he occupied
 “ prior to the execution of the contract.”

NINTH PRINCIPAL QUESTION.

The \$1,616,680.15 of Interest.

It is not often that the interest incidentally included in a money judgment very nearly equals the principal sum of the recovery. But in the present case, plaintiff has recovered of the defendant \$1,616,680.15 (or \$1,600,437.82 as corrected by supplemental finding at *fols.* 712, 713) for interest as against \$1,740,058.38 of principal.

Exception presenting the Question.

The question did not, of course, arise until after the Referee had made his report. In that report, by the 14th so-called "finding of fact" and in the sixth conclusion of law, the Referee awarded interest; and defendant's exceptions to the finding and conclusion are at *fols.* 766, 767, 768—the exception to the conclusion being—"additionally and separately to the portions of said conclusion, allowing "against defendant interest from September 1, "1894, and to each and every part of such allowance of interest."

Facts.

When this suit was brought, plaintiff's claim was entirely unliquidated and uncertain. This was strongly put by plaintiff itself in March, 1900, a few days before beginning this suit, and four years and more after January, 1896, when, as plaintiff admits and the Referee finds, the change of directors had removed any objection on the ground of adverse interest. During that interval plaintiff had made a rigorous and complete examination of defendant's books and accounts, having always and

additionally had before its eyes its own books and accounts. It then knew all that defendant knew or could know. Yet in the March, 1900, letter it admitted that its claim was not liquidated or certain. For it said as to the conversion charges against the \$6,000,000 fund (other than the \$778,493.38 of "journal entry" items) that it did not have "the entire information at hand which is necessary for an accurate determination as to the propriety and justice of the charges, and therefore asked that an accounting be had as promptly as practicable" (*fols.* 591, 592).

The Court is now familiar with the further situation, as claimed by the plaintiff, that, while, in the language of the Referee's 45th finding, the plaintiff and defendant corporations were "controlled by substantially the same interests and set of men" (*fol.* 379), as, according to the Referee, they were until January, 1896 (findings XLVII, XLVIII and XLIX at *fols.* 703-705), no claim of any kind was made by plaintiff against the defendant. The Referee has found that the plaintiff did not, until after the year 1894, "make any claim that there was any sum of money due by defendant to it," or "request the expenditure of any money by defendant on conversion other than the moneys which were so expended by defendant" (finding A-14 at *fol.* 543; finding A-44 at *fols.* 581, 582). The Referee further found (finding A-46 at *fols.* 582-583) that the only request made by plaintiff to defendant after the year 1894, in respect of the expenditure of money, was plaintiff's written letter of 2nd March, 1900, the full text of which is given in finding A-46 at *fols.* 583-593. In that letter reference is made to plaintiff's earlier letter to the defendant of 10th July, 1897, the full text of which is also given in the finding. As we have already shown (*supra*, pp. 226, 227) the letter of 10th July, 1897, contained no demand or request of any kind for payment

or advance of money, but merely submitted questions for which answers were requested at the "earliest convenience" of the defendant. The questions related to the amount of defendant's moneys, credits and securities on hand on 6th June, 1893, the amount of its surplus at that time, etc.; but there was, neither directly nor impliedly, any demand or request for the payment of money or assertion that any given amount was due. In the letter of 2nd March, 1900, plaintiff said to the defendant, referring to the \$6,000,000 par value of securities mentioned in Art. V of the Lease (*fol.* 586):

"We respectfully submit that in particular
"the following entries appearing on the
"books of the Brooklyn City R. R. Co. are
"not properly chargeable as expenditures
"of the said fund:"

There then followed a list of journal entry items so objected to and being the following :

30th June, 1893, for interest on loans	\$27,619.67
30th June, 1893, portion of dividend	90,000.00
30th June, 1893, transfers from Operation to Construction Accounts	161,397.23
28th February, 1894, correcting a credit entry to real estate..	10,000.00
May, 1894, for taxes	4,884.14
31st March, 1894, transfer from Supply to Construction Account (subsequently reduced by \$11,447.40 by journal entry of June 30, 1895).....	134,775.16
January, 1894, services of W. A. H. Bogardus	1,000.00
February, 1894, charged to construction for services of E. D. White	730.00
February, 1894, on motors and controller equipments,	76,275.94

31st March, 1894, transfer from supplies to construction,	150,245.79
August, 1894, interest,	41,655.41
28th February, 1894, crediting Supplies and charging Con- struction,	80,000.00
	<hr/>
	\$778,583.34

In the letter of 2nd March, 1900, the plaintiff, referring to those items,

“ herewith requests prompt payment of
“ the amounts above indicated as due to it
“ under Art. V of the lease with interest
“ from March 10, 1894 ” (*fol.* 592).

Except as to the “ amounts above indicated ” there is no demand whatever. The letter concludes with a request

“ that an accounting be had as promptly
“ as practicable as to the remainder of the
“ \$6,000,000 fund, in order that this long
“ standing account may be finally closed ”
(*fol.* 592).

Obviously this letter, which is the only demand of any kind prior to the commencement of this suit, was a *demand* for nothing, unless for the items of the “ journal entries.” And it is perfectly clear that the plaintiff had no right whatever to recover the amounts of the “ journal entries.” For the “ journal entries,” as very fully set forth under the *Sixth and Seventh Principal Questions* (*supra*, pp. 270, 294–336), were merely items of the adjustment included in the Tripartite Agreement and resulting in plaintiff and the Traction Company giving defendant the \$308,340.35 note in settlement. If the “ journal entries ” were wrong and that agreement voidable, then the fact that they were wrong might help plaintiff obtain a decree avoiding that agree-

ment. But defendant's making those entries in its books obviously gave plaintiff no cause of action. If the amounts of the entries had been wrongly credited defendant on its obligation to "use, apply and expend" moneys in payment of the cost of conversion (Lease, Arts. IV and V), then defendant, to that further extent was still bound, when requested by plaintiff, so to "use, apply and expend" moneys. And plaintiff's sole right was to make such request, and, *if and when*—and only if and when—it were not complied with, to sue for damages or some other relief.

The Court will observe that, down to 2nd March, 1900, there had been no accounting of any kind between plaintiff and defendant, excepting the accounting of August, 1894, incorporated into the Tripartite Agreement. If that agreement be avoided then the situation is that no accounting was ever had between plaintiff and defendant before this present suit was brought.

It is clear that there never was a time in all of the multifarious complication of the transactions between plaintiff and defendant when, if the Tripartite Agreement be disregarded, a specific statement was or could be made of the amount due by it upon conversion under Arts. IV and V of the Lease, or of the amount due by defendant to plaintiff. The trial before the Referee was ample demonstration that the amount was not liquidated. The conceded course of business between plaintiff and defendant included many and complicated credits and debits back and forth in the accounts of each of them. No liquidation or accounting between them was ever had before this suit except in the Tripartite Agreement which plaintiff now repudiates, and which was apparently avoided in and by the effect of the judgment appealed from. The judgment demanded by plaintiff in its complaint was the round and unliquidated sum of \$2,000,000, a

sum considerably in excess of that allowed by the Referee (*fol.* 33).

The very correction in his decision and judgment which the Referee authorized, emphasizes how far from definite ascertainment had been plaintiff's claim. Plaintiff alleged in its complaint (*fol.* 29) that it had itself *before 30th September, 1894*, paid out for conversion the amount of defendant's default; and it asked interest from that date (*fol.* 33). After a trial of eight years the plaintiff claimed and the Referee decided (*fol.* 741) that plaintiff had made such payment by an earlier date, *1st September, 1894*. Still later, after the judgment, the plaintiff had to confess that such supposed payment was not fully made until *26th October, 1894*; and the Referee authorized the correction (*fol.* 712).

POINT I. [*Ninth Principal Question.*]

The accounts between the parties (if the Tripartite Agreement be deemed avoided) having remained open and unliquidated between the parties until the judgment herein, no interest was allowable.

Smith v. Velie, 60 N. Y., 106 (1875): Suit to recover for services with claim by defense of advances to plaintiff of money and goods which were to apply on the wages. By GROVER, J., at p. 111:

“The referee allowed interest from the death of the testator to the date of his report, to which the appellant excepted. I think this exception well taken. The case shows that the accounts between the parties were open and unliquidated. Interest is not allowed upon the balance ultimately found due upon such an account” (*McKnight v. Dunlop*, 4 Barb., 36; *Holmes v. Rankin*, 17 *id.*, 454). ”

White v. Miller, 71 N. Y., 118; 78 N. Y., 393 (1877 and 1879): Action to recover damages for a breach of warranty. On the first appeal, the Court, by ANDREWS, J., said (71 N. Y., p. 134):

“The referee allowed interest on the damages from the time the crop would have been harvested and sold. We are of opinion that this was erroneous. The demand was unliquidated, and the amount could not be determined by computation simply, or reference to market values” (citing authorities).

On the second appeal, the Court, by EARL, J., said (78 N. Y., p. 394):

“The common law rule, as expounded in England, allowed interest only upon mercantile securities, or in those cases where there had been an express promise to pay interest, or where such promise was to be implied from the usage of trade (Mayne’s Law of Damage—2d Ed.—105; *Higgins v. Sargent*, 2 B. & C., 349). In the absence of these conditions, interest was not allowed in an action for money lent, or for money had and received, or for money paid, or on an account stated, or for goods sold, even though to be paid for on a particular day or, for work and labor * * * (p. 395). Thus the law remained in England until the statute of 3rd & 4th William IV., which provides that upon all debts or sums certain, and in actions of trover and trespass *de bonis asportatis*, and in actions upon policies of insurance, the jury may in their discretion allow interest as part of the recovery. We have no statute in this State regulating the allowance of interest in such cases * * * (p. 398). After a very thorough examination of the cases in England and this country I have not been able to find one, prior to this one, in which it

“ has been held that, in a case where the
“ claim was such as not to draw interest from
“ an earlier date, interest could be allowed
“ from the commencement of the action,
“ unless the claim was such that the interest
“ could be set running by a demand, the
“ commencing of the action in such case being
“ a sufficient demand.”

And at page 399 :

“ But there is no authority for holding in
“ a case like this, where the claim sounds
“ purely in damages, is unliquidated and
“ contested, and the amount so uncertain
“ that a demand cannot set the interest run-
“ ning, that it can be set running by the
“ commencement of the action. Why
“ should the commencement of an action
“ have such effect? The claim is no less
“ unliquidated, contested and uncertain.
“ The debtor is no more able to ascertain
“ how much he is to pay. No new element
“ is added. The conditions are not changed,
“ except that the disputed claim has been
“ put in suit; and there is no more reason
“ or equity in allowing interest from that
“ than from an earlier date.”

McMaster v. The State, 108 N. Y., 542 (1888).
The Court, by EARL, J., said at p. 557 :

“ The claimant contends that the Board
“ of Claims erred in not allowing him
“ interest upon the amount found due from
“ the date of filing his petition against the
“ State. If this had been a common law
“ action against an individual to recover
“ damages for breach of contracts under
“ precisely the same conditions, we are of
“ opinion that interest could not legally
“ have been allowed to the plaintiff, even
“ from the commencement of the action.
“ The claim is in every sense unliquidated.
“ There was no possible way for the state to
“ adjust the same and ascertain the amount

“ which it was liable to pay, and hence
“ within the decision of *White v. Miller* (71
“ N. Y., 118; 78 *id.* 393), it was not liable
“ for interest.”

Delafield v. Village of Westfield, 41 App. Div., 24 ; affirmed in 169 N. Y., 582 (1899): Action to recover for labor performed and materials furnished under a contract for the construction of a system of water works, and also to recover damages for the defendant's breach of the contract. The Referee ordered a judgment for plaintiff, but disallowed the latter's claim for interest on the items making up the sum of his recovery. Plaintiff appealed. The Court, by FOLLETT, J., said (41 App. Div., at p. 29):

“ But a single question is urged in
“ support of the plaintiff's appeal, which is
“ that the referee erred in not allowing
“ him interest on all or some of the items
“ making up the sum recovered. The case
“ does not show that the defendant had
“ collected the plaintiff's certified check
“ for \$2,000. * * * The other items
“ making up the recovery were unliquidated.
“ Neither the quantities of the work per-
“ formed nor the quantities of materials fur-
“ nished, for which the prices were agreed
“ on, had been ascertained, nor could they
“ be readily ascertained by the defendant,
“ and the amount when ascertained was
“ subject to a reduction for damages sus-
“ tained by the defendant for improper per-
“ formance by plaintiff of some of the work,
“ and the amounts due for extra work, for
“ which prices were not agreed on, were
“ clearly unascertainable without taking
“ evidence. The claims recovered by the
“ plaintiff were unliquidated (*Mansfield v.*
“ *N. Y. C. & H. R. R. Co.*, 114 N. Y.,
“ 331; *Gray v. Central R. R. Co. of N. J.*,
“ 89 Hun, 477 ; aff'd 157 N. Y., 483). I

“ think no error was committed in refusing
 “ to allow the plaintiff interest on the sev-
 “ eral items included in his recovery.”

Weber & Co. v. Hearn, 49 App. Div., 213 : Action to foreclose mechanic's lien. The Referee allowed interest on what was due under the contract from the completion of the work; and upon claims for extra work, he allowed interest from the dates of plaintiff's several bills and the accompanying demands for payment. The Court, by O'BRIEN, J., said at pp. 216-217 :

“ So far as the amount was due under
 “ the contract, interest was properly allowed,
 “ for upon failure to pay according to the
 “ terms of such contract, the defendant was
 “ chargeable with interest. With respect
 “ to the amount found due for extra work,
 “ we think that interest should only be com-
 “ puted thereon from the date when the
 “ amount was fixed by the referee. This
 “ claim was unliquidated, and there was no
 “ way except by an adjustment between the
 “ parties or a law suit to determine the
 “ amount; and the seriousness of the dis-
 “ pute as to the actual amount is shown not
 “ alone by the denial of the defendant that
 “ nothing was due, but also by the excessive
 “ claim presented by the plaintiff, which
 “ was \$6,000 more than the referee allowed.

“ It cannot be that one who may owe
 “ something is obliged to pay all that is
 “ demanded at the risk of being liable for
 “ interest, by way of damages for refusal to
 “ pay, though it may finally be determined
 “ that the amount demanded was not due.
 “* * *

“ We think the authorities sustain the
 “ principle that *interest upon an unliqui-*
 “ *dated claim, even though on contract,*
 “ *should not be awarded unless with reason-*
 “ *able certainty the amount was or could be*
 “ *fixed.* In other words, the theory upon
 “ which interest can be allowed as damages

“ is that a person owes a debt, the amount
“ of which is fixed, or which by reference to
“ market values or to other sources of in-
“ formation, is susceptible of being definitely
“ determined.”

Excelsior Terra Cotta Co. vs. Harde, 181 N. Y.,
11 : Action to foreclose mechanic's lien for work
performed and materials furnished in erecting a
building for the defendants. The Special Term
had awarded interest. This was held error by the
Appellate Division. The Court of Appeals, by
GRAY, J., said (pp. 13, 14) :

“ I think that the reduction as to interest
“ was right. The plaintiff's claims were,
“ under the circumstances, unliquidated.
“ They were, in fact, upon *quantum meruit*.
“ The finding of the trial court established
“ that the claim under the contract was sub-
“ ject to a reduction, because of defective
“ and dilatory performance, to the extent of
“ nearly one-third of its amount ; while the
“ claim for extra work was wholly dis-
“ allowed. The case comes within the
“ authority of *Delafield v. Village of West-*
“ *field* (41 App. Div., 24, aff'd without
“ opinion, 169 N. Y., 582) ; where the plain-
“ tiff's claim, which was, in part, upon con-
“ tract and, in part, for extra work, was
“ reduced by an award of damages for fail-
“ ure in performance. * * * That case,
“ as an authority, was not questioned in
“ *Sweeny v. City of New York* (173 N. Y.,
“ 414), upon which this appellant relies.
“ On the contrary, being referred to, it was
“ shown, in the opinion, how the two cases
“ differed. * * *

“ While the old common-law rule has been
“ modified, which required that a demand
“ should be liquidated, or its amount ascer-
“ tained, before interest could be allowed,
“ the extent of its modification is that *if the*
“ *amount due is capable of being ascer-*

“tained by mere COMPUTATION, the allowance
 “of interest is proper (see *Gray v. Central*
 “*R. R. Co. of N. J.*, 157 N. Y., 483).”

Chambers v. Boyd, 116 App. Div., 208 : Action to recover the value of services rendered by plaintiff's assignor. The plaintiff claimed that the services were worth \$8,050 and the evidence introduced by him tended to establish that fact, while the evidence of the defendant tended to show that the services were worth much less. The jury found the services to be worth \$3,000, and that the plaintiff was entitled to \$735 interest thereon. The Court, by McLAUGHLIN, J., said at p. 211 :

“I do not think, however, under the facts
 “here presented, that the plaintiff was en-
 “titled to recover interest. He claimed the
 “value of the services rendered was \$8,050.
 “The jury found they were worth \$3,000.
 “I think, under the facts of this case, the
 “claim was unliquidated and interest ought
 “not to have been allowed.”

POINT II. [*Ninth Principal Question.*]

The Tripartite Agreement having remained unavoids and in force until the Referee's decision is a bar to the recovery of interest.

The Tripartite Agreement was disregarded by the Referee on the ground that it was *voidable*, having been made for plaintiff by directors some of whom held stock in defendant (Findings L and LI at *fols.* 705-707). No claim to that effect had been made by plaintiff before the commencement of this action. No such position was even hinted at in the letter of 2nd March, 1900, which was the only request for any sum whatever at any time made upon defendant (Finding A-46 at *fols.* 582-593).

The complaint itself sets forth no such basis for relief; and we have argued in the *Third Principal Question* (*supra*, pp. 213-220), that this alone bars a recovery. But, that point aside, it is evident that, even if voidable, the Tripartite Agreement was not in fact avoided except by the implied effect of the judgment entered upon the decision of the Referee. Since, therefore, until its avoidance, defendant lawfully held the moneys which were in effect adjudged to it in that agreement, plaintiff cannot recover interest for that period in accordance with the principle announced by this Court in a recent case, viz.:

People v. Republic Savings & Loan Association, 97 App. Div., 31: Directors acted as agents for a corporation and performed services, the amount of compensation being fixed by themselves. Upon the insolvency of the corporation they submitted a claim for their services, in accordance with the rather exorbitant amount which had been stipulated. It was held that, until avoidance of the contract, in the absence of actual fraud, they were entitled to the full amount stipulated in the contract. By WILLARD BARTLETT, J., at p. 34:

" There would be no difficulty in sustain-
" ing the judgment against the claimants,
" entered upon his report, if this election to
" avoid the contract had been made before
" it had been fully performed on the part of
" the firm of Case, Gadd & Case. Independ-
" ently of any question of fraud, there is
" no doubt that the contract was voidable at
" any time before it had been fully exe-
" cuted by the claimants at the instance of
" the corporation or its stockholders (*Barr*
" v. N. Y. L. E. & W. R. R. Co., 125
" N. Y., 263, 274). But in the case of a
" contract merely voidable and not void *ab*
" *initio*, the rights of the party seeking to
" enforce it are unimpaired up to the time
" of disaffirmance, and that party cannot be

“deprived of any money payable to him
“thereunder, actually earned, pursuant to
“the terms of the contract, prior to the date
“when it is disaffirmed.”

POINT III. [*Ninth Principal Question.*]

Interest was not allowable even from 2nd March, 1900, on the \$778,493.38 of “journal entry” items specified in plaintiff’s letter of that date.

There has been no recovery on those items. When plaintiff was permitted by the Referee to turn this common law suit into a suit in equity to set aside the Tripartite Agreement, the merits of the “journal entries,” if the Referee rightly gave such permission, were open to scrutiny. The judicial relief, if any, because of the “journal entries,” could be only a decree setting aside the agreement and thereupon awarding such damages as could be shown to have resulted from defendant’s default under Arts. IV and V of the Lease.

Under those articles defendant’s only obligation was (*fol.* 67-72) to “use, apply and expend” the stipulated moneys “in payment, at the request of “the lessee, from time to time, of the cost of converting the railroads.” As has been shown, in our discussion of the *Fourth Principal Question* (*supra*, pp. 224-239), plaintiff made no request for such “use, application and expenditure” with which defendant did not comply. And so the Referee expressly found as to the period before 1895 (findings A-14 at *fol.* 543 and A-44 at *fol.* 582). And, with respect to the period after 1894 the Referee found (finding A-46 at *fol.* 582-592) that plaintiff’s only request is that contained in its letter of 2nd March, 1900 (same finding, *fol.* 582, 583). In that letter the only request is for payment

to defendant of the several amounts of the "journal entries," whereas, as we have said, plaintiff had no right to recover those amounts as "journal entries," but only to recover such damages as it had sustained by reason of plaintiff's own enforced payments necessitated by defendant's supposed default under Arts. IV and V of the Lease to comply with some request under those articles which had not yet been complied with. Now the letter of March, 1900, *made no assertion whatever of any payment by plaintiff*; nor did it base its claim upon any prior request or demand whatsoever. What it said was that

"many of the charges against said proceeds of the \$3,000,000 of stock and \$3,000,000 of bonds were not authorized by the terms of the lease * * * ; that in particular the following entries * * * are not properly chargeable as expenditures of the said fund" (specifying the "journal entry" items). " * * * As to many of the other charges against the \$6,000,000 fund, we have not had the entire information at hand which is necessary for an accurate determination as to the propriety and justice of the charges. * * * The Brooklyn Heights Railroad Company herewith requests prompt payment of the amounts above indicated" (journal entry items) as due *to it* under Article V of the lease, with interest from March 10, 1894, and that an accounting be had as promptly as practicable as to the remainder of the \$6,000,000 fund * * *."

Under Art. V of the Lease nothing was due *to plaintiff* because the \$6,000,000 fund had not been paid out; there was no covenant to pay any of it to plaintiff. The Lease, as we have repeatedly pointed out, contained no promise whatever to make any payment whatever to plaintiff, except on the termination of the Lease (Art. X, *fols.* 78, 79). Plain-

tiff's claim is not like a claim for the contract price for goods sold and delivered or for unpaid wages or salary or work. It is merely a claim for damages for which plaintiff's own payments for conversion might, or might not, turn out to be a measure. At any rate, in the letter of March, 1900, no such demand or claim was made. Upon the amount of the "journal entry" items, therefore, there can lawfully be no recovery even from March, 1900, when the letter was sent defendant and this suit begun, and much less from 1894, as the Referee has allowed it.

Plaintiff's recovery is, in no proper sense, for the "journal entries." It is solely for an alleged shortage in defendants' application of the \$6,000,000 to conversion. And the judgment merely refuses defendant the credit on account of the "journal entries" which had been allowed by the Tripartite Agreement.

POINT IV. [*Ninth Principal Question.*]

Interest was not allowable on plaintiff's claims other than the "journal entry" items.

The case coming here upon the express findings of the Referee that the only request or demand of plaintiff not complied with when this suit was brought was what was contained in the letter of March, 1900—and the only request or demand in that letter, otherwise than with respect to the "journal entry" items being "that an *accounting* be had as promptly as practicable as to the remainder of the \$6,000,000 fund," it is clear beyond argument, upon the authorities, that no interest whatever is recoverable upon the portion—which, in any case, was more than \$1,000,000—of the claim beyond the amount of the "journal entry" items.

It is to be remembered that all of the claims with reference to the journal entries mentioned in plaintiff's letter of 2nd March, 1900, were not sustained by it at the trial. Plaintiff withdrew its assertion with respect to the following items mentioned in its letter (*fol.* 586-590):

28th February, 1894, correcting a credit entry to Real Estate..	\$10,000.00
May, 1894, for Taxes.....	4,884.14
January, 1894, services of W. A. H. Bogardus.....	1,000.00
February, 1894, charge to Construction for services of E. D. White.....	730.00
February, 1894, on Motors and Controller Equipment	76,275.94
28th February, 1894, the Journal Entry of \$80,000 was conceded to be wholly correct, but credit was denied to defendant except as to \$13,542.10, because it represented work done prior to 6th June, 1893 (finding A-35 at <i>fol.</i> 559, finding XXXVIII at <i>fol.</i> 693).....	13,542.10
	<hr/>
	\$106,432.18

The deductions of those items reduces the amount for payment of which request was made in March, 1900, from \$778,583.34 to \$672,151.16.

This of itself emphasizes the entirely unliquidated character of plaintiff's demand; and the Court will again notice that in the March, 1900, letter, plaintiff itself conceded the unliquidated state of the account, saying that it did not itself have "the information at hand which is necessary for an accurate determination as to the propriety and justice of the charges." And this was plaintiff's state of knowledge and information after four years of investigation including a thorough examination of defendant's books and papers and when plaintiff knew all that defendant knew or could be presumed to know.

Indeed that state of information continued on plaintiff's part until a few months ago it stipulated that the judgment originally but erroneously entered in February, 1910, should be reduced by \$16,242.33 (*fol.* 712, 713).

An examination of even the finding leading to this correction—A-42 at *fol.* 567-572—shows manifest error entirely aside from its inclusion of amounts paid by the Disbursing Committee. Payments for construction are stated to have been made (less amounts received from sales of old material) of \$2,154,447.87 (*fol.* 570). Upon this expenditure defendant is admitted to have advanced and applied \$594,506.70 (*fol.* 571), leaving a total advanced thereon by plaintiff and the Disbursing Committee of but \$1,559,941.17. Plaintiff chose, however, to reduce by \$308,340.35 the amount deductible for advances by defendant, leaving a total of \$1,868,281.52 (*fol.* 572, 573). Now it is plain that, irrespective again of plaintiff's right to recover the amount of the note in this action, such deduction from the payments made by defendant should not be had as of 26th October, 1894. The note was taken up by Flower & Co. in June, 1895 (*fol.* 549), and was not finally paid until after the decree of foreclosure of the mortgage of 1st August, 1894, which secured it (*fol.* 8868, 8869). No money on account of it had therefore been paid by plaintiff on 26th October, 1894, nor was any money advanced by plaintiff or the Long Island Traction Co. to pay it until the sale of the property covered by the mortgage in December, 1895. On 26th October, 1894, therefore, plaintiff had and retained the full benefit of defendant's advances of \$594,506.70 on account of the conversion work listed in Finding A-42, and if the amount of the note can be deducted at all from that sum, it certainly cannot be deducted as of that date. In every aspect, therefore, plaintiff's claim on its own showing was entirely and completely unliquidated.

TENTH PRINCIPAL QUESTION.

Validity of defendant's evidential exceptions.

It is true that, since this cause was tried before a referee, the Court will be liberal with reference to technicalities of evidence. But the defendant's exceptions were, it is still to be remembered, taken in an action at common law. And the defendant submits that where, as in some cases here, the exceptions concern substantial and large matters, or specifically raise material questions of law, the defendant is entitled to a reversal upon the material error, if any, which he may show.

Our argument has grown to so enormous an extent that we shall especially argue only a small number of the evidential exceptions which were taken. But the defendant does not waive any of the remaining exceptions; on the contrary, it insists upon all of them.

1. *Exceptions at fols. 4675 to the admission of plaintiff's own written statement to which defendant was in no way a party and without proof of its correctness.*

Plaintiff's exhibit 1118 was offered at fol. 3164, and is printed at fols. 7717-7737. It shows a credit to plaintiff of \$1,030,205.39, with credits to the amount of \$721,893.82, leaving a balance in favor of plaintiff on that account of \$308,311.57. The testimony having been offered in the absence of the Referee, the objection to it was argued before him upon his return by Mr. Trull, and appears at fols. 4673-4675 as follows:

“ At folio 3163 a statement was produced

“made out by the plaintiff, which was read
 “in evidence and marked Exhibit 1118, that
 “was for moneys claimed to have been ex-
 “pended by the plaintiff between January 1,
 “1894, and March 31, 1894. Now, this Ex-
 “hibit 1118, to which we have objected as
 “entirely incompetent and inadmissible, was
 “never approved by the Brooklyn City Com-
 “pany, did not bear the approval of the
 “President, the only evidence on the sub-
 “ject that a single item of it was for con-
 “struction was that the account had been
 “seen by Mr. Swin, the Secretary of the
 “company. I therefore object to that as
 “entirely incompetent and inadmissible,
 “being merely the statement of a claim
 “upon the part of the defendant, made out
 “by their own officers, and a declaration in
 “their own favor, and I ask your Honor to
 “exclude it.”

Whereupon the record proceeds at *fol.* 4675, as follows:

“The Referee: I will receive it.”

The ruling, it is submitted, was reversible error.

2. *Exceptions at fol. 4678 to the admission at fol. 3211 of plaintiff's exhibits 1162 and 1163, and at fol. 4681 to the admission of plaintiff's exhibit 1165.*

The full text of exhibit 1162 is at fols. 7758a (page 2586l of record)—7955. The Court will observe that the total amount of charges against defendant contained in plaintiff's exhibit 1162 is \$1,614,975.75. Exhibit 1162 purports to give the—

“charges to construction on Brooklyn
 “Heights Railroad Company's books from
 “December 31st, 1893, down to and includ-
 “ing October 1st, 1894, which are not cov-
 “ered either by Exhibits 2 and 4 or Exhibits
 “1119 to 1160 inclusive.”

The plaintiff's witness Alfred A. Noble, at *fol.* 3209-3211, described the making of exhibit 1162. He said he had "checked up the items on the "Brooklyn Heights Construction Ledger." That is to say, he had—

"compared the items in that schedule
"with the items in the construction ledger of the Brooklyn Heights Company
"corresponding * * * That statement
"before me is a correct transcript from the
"Brooklyn Heights construction account."

Mr. Trull for the defendant objected to all of these entries, his argument before the Referee personally appearing at *fol.* 4677-4681. He said at *fol.* 4678 :

"These are copies of the books of the defendant company which are offered in evidence. I object to each of them."

Like objection was made by Mr. Trull for defendant at *fol.* 4681 to the admission of plaintiff's exhibit 1165, that exhibit having been offered in the absence of the Referee at *fol.* 3225. Mr. Trull for defendant, at *fol.* 4680, 4681, stated the objection to plaintiff's exhibit 1165 as follows :

"I object to each and every entry from
"the entry book and to each and every
"reference to the report from which it is
"claimed those entries were made, upon the
"ground that they are incompetent and
"immaterial and that it is proving plaintiff's
"case by entries in their own books without
"calling the witnesses who have actual
"knowledge of the transactions."

Thereupon the Referee overruled the defendant's objection, and the defendant excepted (*fol.* 4681). The statement of these objections sufficiently argues them.

3. *Exception at fols. 1065, 4671 and 4690 to the admission of testimony seeking to impeach the Tripartite Agreement.*

The testimony was first offered at the hearing before the Referee on 4th March, 1903, and is at fol. 1064. At the hearing on 21st December, 1904 (fols. 4595, 4596) the plaintiff offered additional evidence to establish the adverse interest of the directors. The Referee was absent when the testimony last mentioned was offered; but at the meeting of 28th June, 1905, he was present, and there was then argued before him the question of the propriety of receiving "any testimony in contravention of the tripartite agreement" (fol. 4658). The objection was renewed at fol. 4688, the testimony being objected to as

"entirely incompetent and irrelevant"
and "that it makes no difference here
"whether they (the directors) were stock-
"holders in one company or another under
"any issue raised by this pleading."

There is another like exception at fol. 4690. Our argument upon the merits of these exceptions has been stated in our contention (*supra*, pp. 213-220), that the Tripartite Agreement could not be assailed by the plaintiff in this case.

The same objection applies to the admission of evidence as to the dividend of \$90,000 on 30th June, 1893, at fols. 3929, 3930, in the absence of the Referee (fol. 3890). The objections, having been reserved until the Referee should attend, were stated to him by Mr. De Witt for the defendant at fols. 4670, 4671, as being that the evidence was "incompetent, irrelevant and immaterial, and not admissible under the pleadings." This exception again and expressly raised the question of the plain-

tiff's right in this action to procure an avoidance of the Tripartite Agreement.

Defendant's exceptions at *fol.* 4671, 4672, to the same class of testimony at *fol.* 3936, 3938, 3939-3951, present the same question.

So does the exception at *fol.* 4605 to the admission of testimony against the Tripartite Agreement,

So does the exception at *fol.* 4698 to evidence tending to show that the accounting included in the Tripartite Agreement was inadequate, and the like exceptions at *fol.* 4699, 4700, 4701, 4737.

4. *Exceptions at fol. 4677 to the admission of the Disbursing Committee's Certificates.*

These certificates are Plaintiff's Exhibits 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160 and 1161, and were offered in evidence at *fol.* 3164-3205. The certificates themselves appear at *fol.* 7738-7758c (page 2586k of record). The defendant's objections to the certificates were stated at *fol.* 4675-4676, Mr. Trull for the defendant saying:

" The testimony is that all the certificates
" and amounts were paid by the Disbursing
" Committee, which was a committee created
" by the tripartite agreement, all subse-
" quent to August 17, 1894, the date that
" tripartite agreement was executed.
" They were not paid under the terms of the
" lease in any form or manner, but by the
" disbursing committee out of the moneys
" advanced to them by the Brooklyn City
" Company, * * * and I object separately
" to each one on the ground that they are
" incompetent and immaterial and that the
" moneys represented by them were not ad-

“vanced under any provision of the lease or
 “under and by virtue of the provisions of the
 “tripartite agreement.”

The validity of these exceptions is covered by the argument which we have already made under the *Eighth Principal Question* (*supra*, pp. 337-350).

5. *Exception, at fol. 5352, to the exclusion of evidence of plaintiff's acquiescence in the correctness of the 1894 adjustment.*

Defendant's counsel put to their witness Daniel F. Lewis, referring to the adjustment of August, 1894, when Mr. Lewis was president of the plaintiff, this question :

“Q. Did any of the gentlemen concerned
 “in these meetings and transactions which
 “resulted in the payment of the two notes,
 “the giving of two notes of the City
 “Railroad Company, and in the effort to
 “raise between One and Two millions
 “more on behalf of the Heights Company
 “to complete the work of conversion, or
 “anybody in connection with any of these
 “notes, any officer or director of any or
 “either of these companies, suggest that
 “the Brooklyn City Company was your
 “debtor at that very time?” (*fol. 5351*).

The plaintiff objected; the Referee sustained the objection, and defendant excepted.

The grounds of the objection, as they are given at *fol.* 5349, 5352, are that the testimony was objectionable because it purported to give discussions which had “resulted in a written instrument in evidence.” But this written instrument was the Tripartite Agreement, which the plaintiff sought to repudiate—and which, if the decision of the Referee stand, he has succeeded in repudiating. Therefore plaintiff cannot avail itself of its sanctity

as a written agreement to exclude evidence as to the making of it. It was perfectly proper that the Referee should be advised of the fact that, in all the negotiations which, according to the Referee's own finding 45 (at *fols.* 378-380), led to and were included in the Tripartite Agreement, no one representing either the plaintiff or defendant made any suggestion that there was at that time any default on the part of the defendant.

FINALLY.

The judgment appealed from should be reversed upon the facts and the law, and a new trial ordered, costs to abide the event.

While we submit it to be clear that there must be a reversal upon questions of law arising on the Referee's findings of fact, it is equally clear that some of those findings are quite unjustified by the evidence, and that findings of fact requested by defendant should have been made. Thus the Referee should have found :

The agreement made between defendant and plaintiff represented by its sole stockholder for continuing conversion work from 14th February to 6th June, 1892 (defendant's request 14 at *fol.* 335);

The negotiation for the adjustment of the accounts which preceded and was included in the Tripartite Agreement (defendant's request 44 at *fols.* 375-377); and

That plaintiff was not the owner of the alleged cause of action when this suit was brought (defendant's request 97 at *fol.* 526).

Thus the Referee should not have found—

That plaintiff had not assigned the alleged cause of action (*fol.* 709);

That there was no consideration for the \$308,340.35 note (*fols.* 694, 695); or

That plaintiff itself paid for conversion the moneys advanced by the Disbursing Committee (*fol.* 700).

BROOKLYN, APRIL, 1911.

EDWARD M. SHEPARD,
ALEXANDER B. SIEGEL,
Of Counsel for Defendant.

WILLIAM C. TRULL,
Attorney for Defendant.

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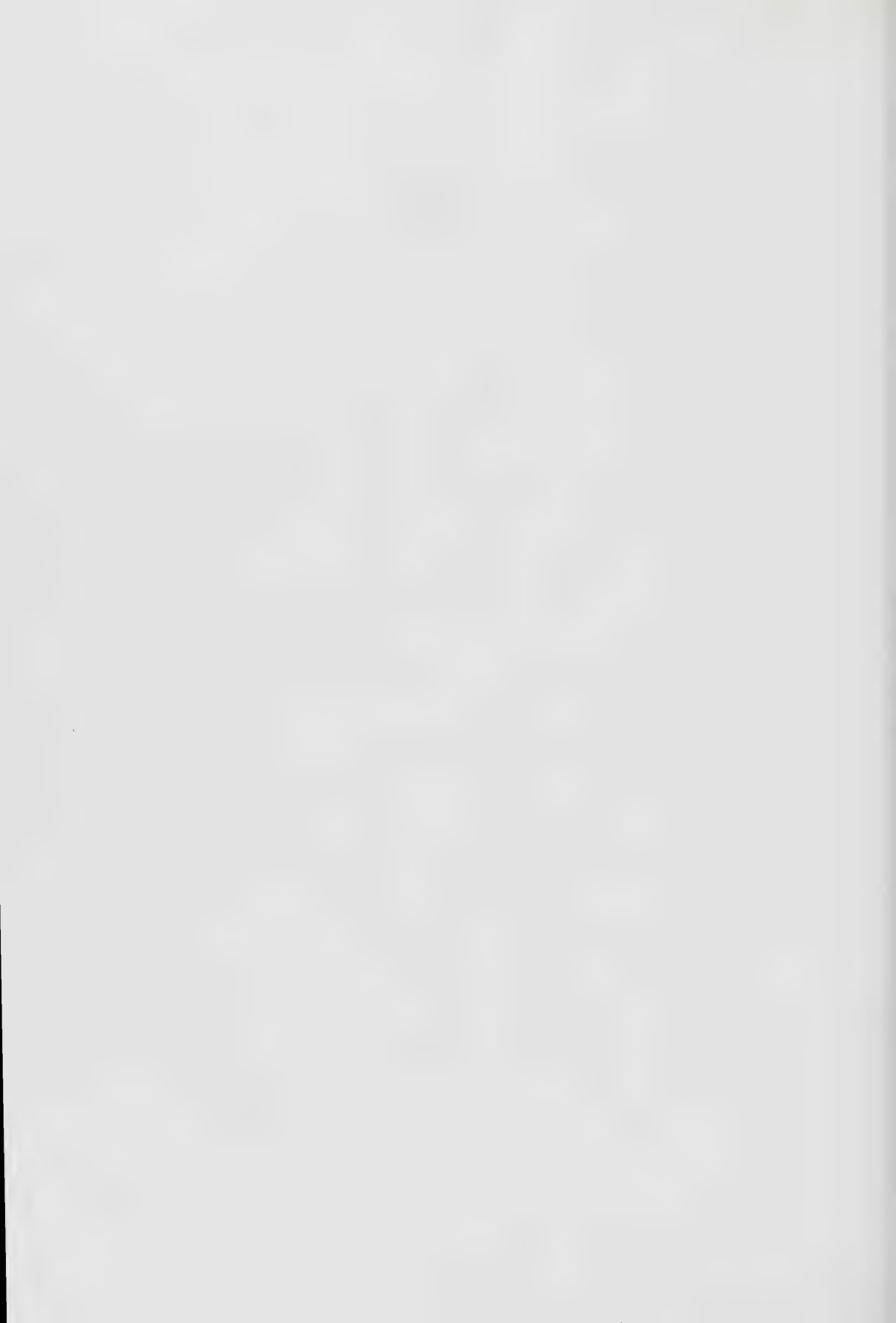
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To be argued by
CHARLES F. BROWN,
ALEXANDER B. SIEGEL,
for Appellant.

Supreme Court,

APPELLATE DIVISION—SECOND DEPARTMENT.

THE BROOKLYN HEIGHTS RAIL-
ROAD COMPANY,
Plaintiff-Respondent,

against

THE BROOKLYN CITY RAILROAD
COMPANY,
Defendant-Appellant.

No. 317.
November,
1911.

REPLY BRIEF.

Two cardinal facts in this cause, emphasized in our main argument, have not been controverted or disputed by respondent.

First.—Disregarding all items disputed by plaintiff, it appears from the findings of the Referee, that defendant furnished a railroad to plaintiff upon which there had been expended by it the sum of at least \$18,419,241.16.* The total sum upon

*FOOTNOTE: This amount is computed as follows:

Total cost of railroad 6th June, 1893 (finding A-75 at <i>fol.</i> 629).....	\$14,009,253.75
Cash advances subsequent to 6th June, 1893 (finding XXXIX at <i>fol.</i> 697—the amount there shown being reached after deducting the amount with interest of the \$308,340.35 note)	4,259,741.62
Equipments delivered to plaintiff on 6th June, 1893, which had not been included in defendant's capital account prior to that date (finding 21 at <i>fol.</i> 340).....	150,245.79

\$18,419,241.16

There was in addition expended the sum of \$324,476.81, which the Referee deducted because returned over a year later as a result of an independent transaction. The total of moneys found to have been advanced before March, 1894, when defendant's expenditures ceased, was, therefore, at the minimum, \$18,743,717.97.

which plaintiff under the Lease pays rental is \$18,925,000, and the difference between this amount and the amount of *conceded and found* expenditure is no more than \$505,758.84. Nevertheless, there is a judgment against defendant, whose principal sum is as much as \$1,740,258.38, and which, with interest added from 26th October, 1894, amounts to the amazing total of \$3,367,330.18. And this shocking discrepancy between the most that plaintiff can claim that it has not received of the moneys represented by defendant's capital stock and bonds, upon the basis of which it pays rental, and the amount awarded in the judgment appealed from, results from the ruling that the work done, as the Referee found, with plaintiff's knowledge and acquiescence, between 14th February and 6th June, 1893, and of which plaintiff, on taking possession under the Lease, received the full benefit, was entirely disregarded by the Referee. The sole reason for such ruling, that defendant must pay over again and with interest the moneys then expended, was that the Referee found that the work should have been deferred till after 6th June ; and this, although plaintiff, through the earlier expenditure, had received identically the same work as that which would have been done after 6th June, with the added advantage of its prompter completion.

Secondly.—There was a settlement of accounts between the parties, ratified by and made a part of the Tripartite Agreement. This was ignored by the Referee on the sole ground that some of plaintiff's directors were stockholders of defendant, and that contracts made by them for plaintiff with defendant were, therefore, voidable by plaintiff. But the Referee in this ruling entirely disregarded the other fact found by him, that the owner of *all* of plaintiff's capital stock, the Long Island Traction Company, approved of and was a party to these

acts of plaintiff's directors. Upon plaintiff, therefore, they are completely binding, since each one of the elements of which the company was constituted, took part in and approved of them; and the Traction Company is not a party to this suit, nor has it, nor any of its stockholders, ever avoided or sought to avoid the settlement.

These obvious and unyielding facts seem almost to dispense with a longer discussion of the controversy; but there are, we beg to remind the Court, seven other principal questions upon which defendant, upon this appeal, claims a ruling in its favor, though the learned Referee's rulings were against it; and additionally, the elaborate brief submitted by our learned adversaries makes it seem suitable that we should present an argument in reply.

FIRST PRINCIPAL QUESTION.

Defendant's Conversion Expenditure 14th February to 6th June, 1893.

POINT I.

The Referee's ruling that the moneys expended by defendant between 14th February and 6th June, 1893, should not be credited to it in determining the extent of its performance of the covenants of the Lease, was a complete subversion of the intentions of the plaintiff and defendant in making the Lease.

Plaintiff in its Brief admits that such ruling is directly at war with the fundamental provisions of the circular addressed, with plaintiff's knowledge, to defendant's stockholders, to acquaint them with the proposed Lease.

Plaintiff's present contention that the Lease was intended to alter these fundamental provisions is directly contradicted by the evidence.

The effect of the judgment rendered below is to nullify the provisions of the proposal for the lease of defendant's railroad, made by Hollins & Co. after the refusal of a prior offer which they had made. These provisions, which we here again set forth as the very foundation of the negotiations between the parties, were as follows :

- (1) That the defendant's stockholders should have dividends of ten per cent. upon their capital stock ; and
- (2) That, in addition, defendant's surplus should be distributed among them.

(Hollins Proposal, finding 3 at *fols.*
295, 299.)

Plaintiff's counsel now admit that these were the salient provisions of the Hollins proposal and that the judgment below utterly undoes them (their brief, pp. 57-68). They assert, however, that the Lease itself, which was approved at the meeting of stockholders held in response to the circular stating the Hollins proposal, and nothing but that proposal (findings 3 at *fols.* 293-302; A-6 at *fol.* 536; IV at *fols.* 658, 659), was intended to make a complete and radical alteration in its terms although neither the stockholders nor any other person had been warned or notified thereof. That any such secret change in the contract between these two railroad corporations was intended is thoroughly unbelievable, and has, indeed, never before been suggested. Yet, admittedly, it is only upon the basis that there was such secret change, that the judgment appealed from can be supported. The findings made by the Referee, as well at plaintiff's request as at the request of defendant, exclude entirely the thought that there was any intention to submit a new and different and much more onerous proposition to defendant's stockholders than that of which they had been given notice. The Referee's findings are as follows :

" II.—On December 12, 1892, Hollins &
 " Co., representing the so-called syndicate,
 " which claimed to own the entire capital
 " stock of the plaintiff, submitted a proposi-
 " tion in writing to the board of directors of
 " defendant proposing in brief :

" (a) The execution of the lease of
 " the property of the defendant to a
 " street surface railroad corporation for
 " 999 years and a guaranty of ten per
 " cent. dividends on the capital stock of
 " the defendant during that period;
 " secured by a deposit of \$4,000,000 as
 " a guaranty fund." * * *

“(d) That the surplus in the treasury
 “ of the defendant at the date of the
 “ delivery of the lease should be di-
 “ vided in due time among the stock-
 “ holders (*fols.* 654, 655, 657).

“ III.—On December 12th, 1892, the prop-
 “ osition so submitted was accepted by the
 “ Board of Directors of the defendant sub-
 “ ject to the approval of its stockholders
 (*fol.* 658).

“ IV.—On January 6th, 1893, the defend-
 “ ant issued a circular to its stockholders
 “ reciting the proposition so made, and ac-
 “ companying such circular sent out a no-
 “ tice calling a meeting of the stockholders
 “ of the defendant to be held on February
 “ 15th, 1893, to vote upon the approval of
 “ the proposed lease (*fol.* 659).

“ 4 : The proposition was duly accepted
 “ by the defendant, and the lease annexed
 “ to the complaint was formulated by
 “ parties representing Hollins & Co.,
 “ bankers, and by the plaintiff and the de-
 “ fendant (*fol.* 302).

“ 5 : On the 14th of February, 1893, said
 “ lease was duly executed and acknowledged
 “ in duplicate by the plaintiff and defendant,
 “ and on the 14th of February, 1893, was
 “ duly approved by the stockholders of the
 “ plaintiff and on the 15th of February,
 “ 1893, was duly approved by the stockhold-
 “ ers of the defendant ” (*fol.* 303).

A consideration of the evidence upon which the Referee's findings were based conclusively shows that no change in the parties' intentions took place and that none was intended to be expressed. The terms of the proposed acquiring of defendant's rail-road by the syndicate formed by Hollins & Co. had been the subject of close bargaining between its members and defendant's board of directors (*fols.*

5226-5228). One proposition made by the proposing syndicate had, as appears from defendant's minute book, been rejected by unanimous vote (*fol.* 5227). On 12th December, 1892, defendant's board again met to consider a further proposal, and its action is disclosed by the minutes—

“The chair stated the object of the meeting to be the consideration of an amended proposition submitted by Messrs. Hollins & Co. to the Executive and Advisory Committees, and which had been thoroughly canvassed by those committees, with the result that it was thought worthy the action of the Board of Directors. * * *

“A discussion of the merits of the proposition followed, and it was moved and seconded that the proposition be approved and referred back to the Executive and Advisory Committees for completion and perfection of details. Carried unanimously (*fol.* 5228).”

On 29th December, 1892, defendant's board of directors, acting on the recommendation of its executive committee, passed the following resolution:

“Resolved, that this Board hereby approves the proposition submitted by the New York Guaranty & Indemnity Co. to the Executive Committee of this Board, and approved by said Committee, and that such proposition be referred to the Executive Committee, and said Committee be and is directed to have prepared by the counsel for the company a lease of the railroad and properties of the Company for execution by this Board, and that said Committee and said counsel be and they are hereby instructed to confer and cooperate with the counsel of the New York Guaranty & Indemnity Co. in the preparation of said lease, which lease when executed is to be subject to the approval of the stockholders. * * *

“ The assistant secretary read a paper
 “ which had been prepared by the New York
 “ Guaranty & Indemnity Co., embodying
 “ the principal points of the proposition,
 “ and which it had been deemed advisable
 “ should be given to the public through the
 “ press.

“ On motion the chair was authorized to
 “ submit the paper to representatives of the
 “ press ” (*fols.* 5230-5232).

Testimony as to the drafting of the Lease upon this direction from defendant's board of directors is brief, but its very briefness shows that the Lease was not intended to embody an entirely new agreement.

Mr. BERNARD BURKE, a member of the firm of Hollins & Co. testified merely :

“ The circular to the stockholders of the
 “ the Brooklyn City Railroad Co. might have
 “ been prepared under our direction. That
 “ states the situation (*fol.* 5232). * * *
 “ That contains our proposition. This lease
 “ between the Brooklyn City Railroad Com-
 “ pany and the Brooklyn Heights Railroad
 “ Company is dated February 14, 1893, and
 “ was negotiated, prepared, and so far as
 “ the plaintiff and the Traction Company are
 “ concerned, was executed altogether under
 “ my direction and by my control ” (*fol.*
 5234).

Mr. DANIEL F. LEWIS, who was, at the time of the execution of the Lease, defendant's president, testified :

“ We had conferences with certain indi-
 “ viduals as to the composition of that
 “ lease. With the officers, counsel and
 “ Hollins & Company. Hollins & Com-
 “ pany were also represented by counsel.
 “ Julien T. Davies, Joseph Auerbach and Mr.
 “ Lowery represented Hollins & Company in
 “ the early history and all during the pen-
 “ dency of these negotiations, if I recollect

“rightly. William C. Trull represented us, or
 “the Brooklyn City Railroad Company. And
 “they were the only parties who met in the
 “composition of that lease, the consideration
 “of its various sections and general outline.
 “The officers of the Heights Company were
 “largely figureheads, as I recall it, and the
 “parties who did that business consisted of
 “the attorneys, counsel of Messrs. Hollins
 “& Company and myself representing the
 “Brooklyn City Railroad Company, and at
 “intervals we had necessary conferences
 “with our executive officers and Mr. Trull
 “as counsel. Mr. Trull, myself, Hollins &
 “Company, Davies, Stone & Auerbach and
 “Mr. Lowery, connected with them, were
 “the parties who meditated, expressed and
 “devised, as a matter of draft, this lease”
 (*fols.* 5263, 5264).

Nor does Mr. JOSEPH F. AUERBACH, who was
 plaintiff's counsel in drawing the Lease, make men-
 tion of any change to be embodied therein. He
 said:

“The syndicate consisted of Hollins &
 “Company and their associates. The min-
 “utes of the Brooklyn City Railroad Com-
 “pany, introduced in evidence, show the first
 “proposition to rent the lines of that com-
 “pany to have been accepted by the City
 “Company on December 29th, 1892. On
 “or about that time I had consultations
 “concerning that proposition. I took part
 “in the drawing of the lease. * * * It
 “was Hollins & Company who made the
 “proposition accepted December 29th, 1892.
 “I remember the approval of the lease by
 “the stockholders on February 15th, 1893
 (*fols.* 5654-5655).

And from the testimony of Messrs. Hollins,
 Burke, Lewis and Auerbach of their consultations
 subsequent to the execution of the Lease quoted
 fully in our main brief at pp. 76-81, it appears

clearly that no one then supposed that the Lease had been intentionally so drawn as to alter radically the Hollins proposal. The circular of 1st July, 1893, issued by Hollins & Co. to invite investors to purchase the Long Island Traction stock, and on which plaintiff relies (its brief, p. 124) again shows that no other agreement than that of the so-called Hollins proposal had been embodied in the Lease, certainly not at the request of Hollins & Co., who alone represented the plaintiff in the negotiations as the owners of its entire capital stock. This circular, in setting forth in figures the prospects of the Traction Co., refers in no less than three instances to the

“ Brooklyn City R. R. Co. *guaranteed*
“ *10% stock* ” (fols. 8766, 8768) ;

and it closes with the following statement :

“ In connection with the above we beg
“ to call your attention to the enclosed
“ memorandum regarding the Brooklyn
“ City R. R. Co's *Guaranteed 10% stock* ”
(fol. 8769).

As late as 2nd March, 1900, four days before this action was commenced, plaintiff's own officers impliedly rejected the hypothesis that the Hollins & Co. proposal had suffered a change when worked into the Lease. The letter then written by Mr. Timothy S. Williams, demanding the payment by defendant of the amounts of certain journal entries, concluded as follows :

(italics ours) “ *Our attorneys advise us*
“ * * * that the lease contemplated that
“ the Brooklyn Heights R. R. Co. should
“ have the benefit of the expenditure of
“ the \$6,000,000 fund during the term of the
“ lease, which began June 6, 1893. *If this*
“ *advice is correct*, it would seem that that
“ portion of the charges comprising the

“ \$6,000,000 for supplies, labor, services,
 “ material or property furnished or acquired
 “ prior to June 6, 1893, was improperly made
 “ under the terms of the lease” (finding
 A-46, *fols.* 591, 592).

And Mr. Williams testifying orally at the trial,
 said:

“ Q. Do you remember presenting any
 “ bill to your company of your claim, as
 “ you considered it, the claim against the
 “ City Company? A. I presented the result
 “ of my investigation of the accounts.
 “ The amount of that claim was between
 “ \$600,000 and \$700,000, as I recall it. That
 “ is part of the same thing alluded to in
 “ that letter.

“ Q. If there was any other part, didn't
 “ you present it in your report to your own
 “ Company at the time you speak of? A.
 “ Yes; I reported at the same time an opin-
 “ ion from our counsel, who went further
 “ and advised us that all charges prior to
 “ June 6, 1893, were not proper charges
 “ against the \$6,000,000. *Up to that mo-*
 “ *ment I had not any such claim.* * * *

“ Q. Did you at any time personally make
 “ any other claim than that about which
 “ you spoke at the time of your transfer
 “ from one office to another, against the
 “ City Railroad Company? A. Nothing but
 “ by advice of counsel.

“ Q. Then the theory that the defendants
 “ were liable to your Company for the
 “ amount spent between February and June
 “ 6, 1893, *originated with your counsel,*
 “ *didn't it?* A. Yes.” (*fols.* 4857-4859).

The evidence is thus clear and, we submit, irrefragable, that no other program than that embraced in the Hollins proposal was intended to be embodied in the Lease, and a consideration of its provisions amply discloses that it was the Hollins proposal and none other which the eminent lawyers

who drew the Lease meant it to express. Indeed, the grossness of the fraud involved in the conclusion that a Lease was presented to stockholders for their approval radically different from that which was indicated to them in the circular issued by their directors advising that they approve the Lease, must effectually exclude such conclusion.

Plaintiff's argument, to which it devotes much space (its brief, pp. 27-46), that the delay in its taking possession of the demised railroads was contemplated from the first, and that, therefore, the cost of the work done before it took possession was under no circumstances to be taken into consideration in determining whether defendant had fulfilled its obligations under the Lease, is plainly inconsistent with itself. It is true, as plaintiff says, that the circular to defendant's stockholders provided for a delay of at least sixty days in taking over the demised property after the Lease was ratified (*fol.* 300), and that the time taken up in forming the new traction company and in arranging necessary details would inevitably extend this period of delay beyond the sixty days. But the very circular which prescribed the postponement provided also, as we have seen, that defendant should be guaranteed dividends at the rate of ten per cent. upon its capital stock and that its surplus should be distributed among its stockholders. These guarantees or stipulations were, therefore, made with the full realization of the fact that there would be some delay and they were secured to defendant irrespective of the delay. In view of the express stipulations of the circular, it seems impossible to contend, as plaintiff does, that the foreseen delay in taking possession evinced the understanding of the parties that defendant's surplus should be meanwhile expended and not distributed among its stockholders as the same circular provided, and that, if expenditures beyond the amount of defendant's surplus should

be made, they must be made out of rental, upon which alone the guaranteed ten per cent. dividends rested. Any additional delay beyond such as may have been occasioned by negotiations concerning the Markey injunction were caused solely by plaintiff in its efforts to secure proper financial backing, with which defendant had nothing whatever to do.

Plaintiff carps at the provision of the circular that ten per cent. dividends should be guaranteed under the Lease (its brief, p. 65). While obviously impracticable to guarantee to the defendant's stockholders as individuals the payment of ten per cent. dividends on their stock, the same result would be reached by making provision for payments to the lessor during the term of the Lease, by way of rental, sufficient to furnish it with funds wherefrom dividends at the rate of ten per cent. could be paid to its stockholders. This view was clearly adopted by the framers of the Lease. The lessee was required to pay for the lessor the entire current cost of maintaining its corporate existence and of performing such other functions as remained to it after it had parted with all of its property under the Lease (Arts. XV, XVI, XVII, *fols.* 85-89). The lessee was then required to pay additionally the interest on all of the lessor's outstanding bonds, whatever the rate of that interest might in the future be (Art XIV at *fols.* 84, 85); and it was further provided that, in case any renewal bonds should sell at less than their par value, the lessee should pay to the lessor an amount equal to the difference between the par value of such bonds and the amount for which they should be sold (Art. XIX at *fol.* 91). The payment by plaintiff of all possible disbursements or requirements of defendant having thus been provided for, the lessee was further required to pay as rental ten per cent. annually upon the lessor's authorized and outstanding capital stock, thus furnishing a fund from which

dividends of the full ten per cent. could be paid (Art. XIV at *fols.* 82-84). The performance of these obligations was secured to defendant's stockholders by the guaranty fund of \$4,000,000; and they were thus apparently assured of a clear net ten per cent. which would go to them as dividends.

Obviously, however, if defendant were required to expend more than the proceeds of its entire capital upon the property leased, the rental of ten per cent. on its capital stock would not suffice to give that return upon the moneys actually invested; and it is clear that the drafters of the Lease had in mind the fact that *only* the proceeds of defendant's stocks and bonds taken at par should be put into the railroad leased. To them these capital moneys naturally divided themselves into two concrete groups: *First*, the \$3,000,000 proceeds of capital stock issued on 3rd January, 1893 (*fols.* 859, 862), that is, at the very time that the Lease was being drafted; and, *secondly*, the \$6,000,000 of capital stock and bonds as yet unissued. The Lease was to provide that the proceeds of all of these should be expended upon the property demised, and it did so provide. And conversely, it provided for the expenditure of no money from any other source—the only possible other sources being defendant's surplus and the rental which plaintiff was to pay to it.

Plaintiff's counsel suggest that defendant might have sold its stock at a premium instead of issuing it to its stockholders at par (its brief, p. 77). But what it did in that respect was not only a part of the bargain submitted by Hollins & Co. and accepted by defendant's directors (finding 3 at *fols.* 298, 299), but it was expressly prescribed by the Lease, in which defendant covenanted

“ to issue three million dollars (\$3,000,000)

“ of its capital stock now unissued * * *
 “ *and to sell and dispose of the same at*
 “ *par* ” (fols. 69, 70).

Plaintiff's counsel further urge (its brief, p. 77) that defendant received a premium of \$221,903.50 on the sale of its unissued bonds, and that this was a fund devotable to conversion expenditure. But here again the Lease expressly provides that it is only the proceeds of the bonds

“ *less* any premium realized or received on
 “ the sale of the said bonds ” (fol. 70),

that were to be applied to the conversion work. The Lease, therefore, expressly excluded any possible premium on the sale of defendant's stock or its bonds as affording a fund from which conversion expenditures should be made, and the only possible resources of defendant outside of its unexpended capital were its surplus and the rental which was to come to it.

The expenditure of the entire \$3,000,000, which the corporation had just then received from its stockholders, was assured by Art. IV, which provided that the lessor “use, apply and expend” “in payment of the cost of converting the rail-roads of the lessor into an electric railroad”

“ all moneys, credits or securities on hand
 “ at the date this lease shall take effect,
 “ *less* the amount required to pay and dis-
 “ charge the indebtedness, obligations and
 “ liabilities of the lessor as of that date other
 “ than its bonded indebtedness upon bonds
 “ issued or assumed by it, and *less* the amount
 “ of its surplus earnings diminished by a *pro-*
 “ *rata* amount of accrued interest and
 “ accrued rentals agreed to be paid by the
 “ lessor and a *pro rata* amount of taxes for
 “ the current year ” (fol. 67).

Since the surplus and the amount of defendant's indebtedness were to be deducted from the moneys, securities and credits on hand to be expended in converting the demised railroads, it is plain that only *capital* moneys were covered by this Article of the Lease. The only moneys expendable under Art. IV and meant to be covered thereby, were, therefore, such portion of the \$3,000,000 received on 3rd January, 1893, as might remain uninvested or unappropriated to conversion indebtedness on the date the Lease should take effect. The \$6,000,000 to come from the sale of the unissued capital stock and bonds were required to be expended by Art. V, the following article of the Lease. Thus provision was made for the devotion of defendant's entire capital (though nothing more) to the conversion and construction work. Probably because of misinformation or misunderstanding on the part of the lawyers who drew the Lease as to the actual financial situation of the defendant, in that they apparently did not contemplate what was actually to occur (it may be noted that the \$3,000,000, which seemingly came in hand as cash to defendant on 3rd January, 1893, had in large part to be immediately devoted to paying construction loans by the aid of which the work had theretofore been prosecuted [*fols.* 1184-1186]), it so happened that at the date when the Lease took effect there were no moneys on hand remaining from the previous issue of stock, but the work was again being prosecuted by the aid of loans made in anticipation of the new issue of stock. This, however, can in no way affect the plainly expressed intention of the Lease, that only defendant's capital taken at par, and not moneys from any other source, should be expended upon the leased property. Not a single word or sentence of the Lease indicates that either defendant's surplus or the rental payable to it under the Lease

should be devoted to the conversion work. Plaintiff has pointed to no such provision ; but it claims that such requirement is implied in the *proviso* (though constantly referred to by plaintiff as an independent covenant) of Art. IV, that defendant should pay its indebtedness as of the date when the Lease should take effect, and the full text of which *proviso* is as follows :

“ Provided, however, that the lessor shall
 “ pay and discharge its said indebtedness
 “ other than its bonded indebtedness and
 “ its liabilities assumed by the lessee, as of
 “ the date when this lease shall take effect,
 “ and also the said *pro rata* amount of ac-
 “ crued interest upon its said bonded in-
 “ debtedness and of its rentals and shall
 “ pay over to the lessee upon demand the
 “ said *pro rata* amount of taxes for the
 “ current year, estimated as aforesaid ” (*fol.*
 69).

But this *proviso* adds nothing to what preceded it in Art. IV. That Article required that the “ moneys, credits, and securities on hand,” less defendant’s surplus and less the amount of its indebtedness as of the date the Lease should take effect, should be expended in the conversion work. The moneys to be expended were, therefore, only “ capital ” moneys, since the surplus was expressly excluded from them. Not the surplus only, however, but also the amount of defendant’s indebtedness was to be deducted from the moneys, credits and securities on hand. Hence Art. IV, so far as we have considered it, did not provide for the expenditure of *all* of defendant’s unexpended capital, for the amount of defendant’s indebtedness was deducted therefrom. This omission was corrected by the *proviso* of that Article, which we have quoted, that the remaining amount of its unexpended capital (equal to defendant’s indebtedness)

and not required by Art. IV to be expended in conversion, should be expended in paying off such indebtedness, so that the investment in the railroad of every dollar of defendant's capital was assured. The *proviso* plainly was not intended to supply an independent and different fund—whether defendant's surplus, or the rental payable by plaintiff—from which conversion expenditures were to be made, but merely to insure that all of defendant's capital should be invested.

That the plain intention manifested by the parties in the whole instrument should be given effect hardly needs citation of authorities; but it is amply sustained by the facts and reasoning of the cases cited on our main brief (pp. 97, 288-292).

Schoellkopf v. Coatesworth, 166 N. Y., 77 ;
Chesepeake & Ohio Canal Co. v. Hill, 15 Wall., 94 ;
Clark v. New York Life Ins. & Trust Co., 64 N. Y., 33 ;
D., L. & W. R. R. Co. v. Bowns, 58 N. Y., 573, 579 ;
Pressed Steel Car Co. v. Eastern Railway of Minnesota, 121 Fed., 609, 611 ;
O'Brien v. Miller, 168 U. S., 287, 297 ;
Miller v. Hannibal & St. Jo. R. R. Co., 90 N. Y., 430, 433.

Plaintiff's contention that the Lease required the expenditure of moneys beyond the amount of the par of defendant's capital stock and bonds is not only entirely at variance with the plain intention disclosed by the Lease itself, but gives to the Lease so absurd a meaning as to be intolerable. It would imply that, though the rental to be paid by the lessee was fixed, the amount of money to be invested by the lessor should be uncertain and de-

pendent upon entirely fortuitous circumstances. For if plaintiff were right in claiming that the guiding, though Procrustean, rule of the Lease was that the sum of \$6,000,000 must be expended after the date on which the Lease took effect, whatever that date might turn out to be, then the lessor would have had in its unrestrained control the total amount which should be invested in the railroad leased. Such amount, it is evident, would depend upon the moneys expended upon conversion between 14th February, 1893, and the date the Lease took effect. That lay within the discretion of the lessor. It might do the work faster, or more slowly, or might cease work altogether; and the value of the property which, under the Lease, was to come to the lessee and for which a fixed rental was to be paid, was, under plaintiff's contention, to be undefined, uncertain, and within the control of one of the parties to the Lease. On the other hand, the amount invested would further depend on the day which should happen to be fixed as that on which the Lease should take effect. The framers of the Lease had no way of knowing when that day would be, any more than they could know at how fast a rate, and at what expense, conversion work would be proceeded with in the interim. And yet plaintiff would impute to them the intention of so framing the Lease that the amount to be invested should be dependent also on this uncertain and uncontrollable factor. Under this construction it would have been to defendant's advantage to reduce its work to the minimum; it would have been to plaintiff's advantage to delay as long as possible the taking effect of the Lease which it had sought. That such jockeying, or the possibility of such jockeying, was contemplated by the framers of the Lease, or by the parties for whom they framed it, is inconceivable. We must again ask the Court

to remember that the only possible sources of money over and beyond defendant's capital (which, under the Lease, [Art. V, *fols.* 69, 70] as well as under the Hollins proposal [finding 3, *fols.* 298, 299] was to be taken at par), were (1) its surplus, and (2) the rental payable to it by plaintiff under the Lease. And we confidently assert that there can scarcely be devised language strong enough to provide that the amount of surplus remaining to be divided among defendant's stockholders, or the amount of rental payable under the Lease, should be dependent entirely, either upon voluntary acts of each of the parties in which neither could control the other, or upon sheer accidents (*e. g.*, strikes, or intemperate weather, which would diminish the amount of work) over which neither party had any control whatsoever.

Schoellkopf v. Coatesworth, supra ;

Coyne v. Weaver, 84 N. Y., 386, 390;

Russell v. Allerton, 108 N. Y., 288,
292 ;

Heyn v. N. Y. Life Ins. Co., 192 N. Y.,
1 ;

Wright v. Reusens, 133 N. Y., 298.

Respondent claims at p. 57 of its Brief that this Court has construed the Lease so as to authorize an invasion of the rental payable thereunder. Such claim of respondent is to be explained only on the hypothesis that counsel have entirely overlooked the sentences following those from which they quoted, which make it clear that this Court's ruling was to the exact contrary of their present contention.

The Brooklyn Heights Railroad Company v. The Brooklyn City Railroad Company, 124 App. Div., 896 ; *aff'd*

196 N. Y., 502. By BURR, J., at p. 898 :

“ I think that it was the intention of the
 “ parties to the lease that *not only* the in-
 “ terest on the bonded indebtedness of the
 “ defendant should be paid by the plaintiff,
 “ but that a fixed sum in addition should be
 “ paid as rental which (if no deductions were
 “ made therefrom) would *yield to the stock-*
 “ *holders of the lessor company dividends at*
 “ *the rate of ten per cent. per annum. To*
 “ *avoid making such deductions, it was*
 “ necessary that the current expenses of the
 “ defendant as a living corporation should be
 “ paid by the plaintiff. *I think that was*
 “ *what was intended* by the phrase, ‘keep-
 “ ‘ing up the organization.’ ”

This Court did hold that, if the lessor unreasonably and wastefully expended moneys during the continuance of the Lease, it could not demand that they be supplied by the lessee ; but all proper and necessary expenses must, so this Court held, be reimbursed to it, so that the rental could go intact to its stockholders as dividends of ten per cent. upon its stock.

Plaintiff places much insistence upon the supposed fact that purchasers of the stock of the Long Island Traction Co. had been assured that \$6,000,000 would be invested in the leased railroad after 6th June, 1893 ; and it states in its brief (p. 7) that little or no trading was done in this stock until after the issuance of the circular of Hollins & Co. dated 1st July, 1893, which invites purchasers for the stock. But this circular states in unambiguous terms, and most conspicuously at the very commencement of its tabulation, that back of the \$30,000,000 capital stock of the Long Island Traction Co. were invested the \$18,925,000 capital stocks and bonds of the defendant, *and nothing more* ; and it is explicitly stated that dividends of ten per

cent. are *guaranteed* on defendant's stock. The statement of the circular was *verbatim et literatim* as follows (fols. 8765, 8766):

" CAPITALIZATION.

" Authorized 5% 25-50-	
" year bonds (Brook-	
" lyn City R. R. Co.)..	\$6,925,000
" Amount outstanding.	\$3,925,000
" Authorized Brooklyn	
" City R. R. Co. guar-	
" anteed 10% stock...	12,000,000
" Amount outstanding.	9,000,000
" Long Island Traction	
" Co., Capital Stock...	30,000,000 "

There is no assertion or even a remote intimation anywhere in this circular in any form whatsoever, that \$6,000,000 was to be expended after 6th June, 1893, in spite of the fact that to make this expenditure would have compelled defendant to employ moneys over and beyond its capital, which was named as the basis of the Long Island Traction Co. capitalization. Not a single stockholder of the Long Island Traction Co. ever at any time made any claim that the Lease should be so construed; and we respectfully submit that it is small wonder that when plaintiff's counsel invented this claim, Mr. Williams, plaintiff's vice-president, refused to report it to his directors as his own view, and that even in writing to the defendant the letter demanding payment of the amount of journal entries, he referred to it with a disclaimer on his own part.

POINT II.

The agreement between the defendant and Hollins & Company that the work of conversion should be continued by the defendant after the Lease was executed, and that the moneys expended by the defendant should be credited to the \$6,000,000 fund, did not violate any provision of the Lease.

The fund for conversion was "all moneys, credits " or securities on hand when this Lease shall take " effect "; less the indebtedness as of that date and less the amount of surplus earnings, etc. (Art. IV) and proceeds of the unissued capital stock and bonds amounting to \$6,000,000 (Art. V).

Interpreting literally Article IV the defendant was entirely unrestrained by the Lease from proceeding with conversion work and paying therefor out of its moneys, credits and securities on hand. It might expend all of that fund before the Lease took effect. The only result of so doing was when the Lease did take effect there would be no fund under Article IV which the lessee could request to be expended by the defendant.

If the parties be deemed at the time to have considered Arts. IV and V as entirely apart from one another, then the indebtedness of defendant could have been payable only out of the moneys, securities and credits which remained on hand when the Lease should take effect. While the defendant was free to go on with the conversion work before the Lease took effect and to expend in payment therefor the fund referred to in Article IV, it would not, of course, proceed with such conversion work beyond the point which would imperil its ability to pay its indebtedness out of the fund and also to reserve therefrom its surplus.

That this would necessarily have been the action of the defendant is plain from the fact that it had no other resources out of which to pay its indebtedness, as it had leased all its property to the plaintiff except its moneys, credits and securities on hand, and it had rendered itself unable to increase the amount of such fund by its agreement to apply the proceeds of all unissued stock and bonds to the payment of conversion expenses by Article V of the Lease.

It would undoubtedly have been an extremely difficult matter at the date of the execution of the Lease to determine precisely what the indebtedness of the defendant was, and the amount of the moneys, credits and securities on hand when the Lease was executed was a relatively small sum.

In view of these facts the course which the defendant would probably have taken, if the request had not been made that it should proceed with such conversion and reimburse itself out of the proceeds of stocks and bonds when issued, would have been, so far as was practicable, to have ceased work on the conversion of its railroad altogether.

It is quite apparent that from the defendant's standpoint, that would have been the only safe and prudent thing to do, until the Lease went into effect.

The respondent's argument that it was contemplated and intended that in the period between the execution of the Lease and its going into effect the defendant should proceed with the work of conversion has therefore no foundation in the circumstances surrounding the parties at the time of the execution of the Lease, and is contradicted by the undisputed financial condition of the defendant.

Thus if the parties be deemed to have considered Arts. IV and V as independent of one another, and not as providing a single fund for the lessee (and

it is plain that the proceeds of the stock and bonds to be used in conversion, whenever issued, would have constituted a single fund if the Lease had not been made), then clearly Art. IV must be left out of consideration in construing the acts of the parties subsequent to the execution of the Lease, for, as we have seen, it would in that case have been utter folly for defendant to expend the moneys, securities and credits on hand.

Let us now consider the provision of Article V.

It has already been pointed out on our main brief (p. 114) that the Lease prescribed no definite time for the doing of the work of conversion.

The only provisions in Article V which have relation to the time of the performance of such work are those providing that the unissued capital stock should be issued "within six months after the delivery of the Lease," and that the unissued bonds "shall be issued from time to time as requested by the lessee."

These provisions were for the benefit of the lessee and their enforcement gave to it a limited control over the time when interest would begin to run upon the bonds and when dividends would have to be paid upon the stock. The proceeds of the securities were, however, to be expended by the defendant at "the request of the lessee" in payment of conversion cost.

The substance of this article of the Lease was to furnish a fund which would be available to the lessee at its request for the payment of the cost of conversion.

Now assuming, as the respondent argues, that the lessee could enforce no request for the payment of money by the defendant until the Lease went into effect, it is clear that if such request were made and acquiesced in by the defendant, such request and acquiescence violated no provision of the Lease whatever.

This would certainly be true as to a request and acquiescence after a delivery of the Lease and the request by the lessee and acquiescence by the lessor before the delivery would violate no substantial provision of the Lease.

There was no limitation upon the issue of bonds except the request of the lessee, and the six months limitation upon the issue of stock could be waived by either party so far as it applied to them.

All that can be said as to these provisions of the Lease is that the defendant might have refused to make payments upon the request of the lessee until the Lease went into effect, but the right to make such refusal did not rest upon any specific provision of Arts IV or V, but upon the general ground that the defendant could not be compelled to perform any of its covenants until the lessee deposited the guarantee fund and took possession of the demised property.

But it is very clear that the defendant could waive that right, and as the speedy performance of the work of conversion was of great benefit to both parties and to the public, and could not, even if the lessee failed to take possession of the property, result in any loss to the defendant, it was quite natural that the lessor should waive them when request by the lessee was made.

As the limitation upon the issue of stock and bonds could be waived by the parties, it was equally proper and consistent with the Lease that money should be borrowed by the defendant with which to pay for the work of conversion requested by the lessee, and that the lessee should have agreed that the defendant should reimburse itself for the payments made out of the proceeds of the stock and bonds issued.

In fact, however, there being no limitation of time as to the issue of the \$3,000,000 of bonds, and no limitation of time as to the request provided for

in Art. V, it was perfectly consistent with everything in the Lease that plaintiff should request, before possession was delivered to it under the Lease, that defendant issue the bonds and expend the proceeds in conversion, which request could be accepted and acted upon by defendant. A request was made, general in form, that defendant go on with the work and reimburse itself from the moneys provided by the Lease. Since a request could have been made in form so as not in the slightest detail to impinge upon any word or sentence of the Lease, we submit that the Court will give effect to the intentions which the parties had when the request, general in form, was made by Hollins & Co. and accepted by defendant. The Court will not be zealous to secure injustice in undoing what the parties intended, involving the expenditure of truly enormous amounts of capital, particularly when what was done can be considered to have been done entirely within the letter, as well as within the spirit, of the Lease.

As already stated the fund provided for by Article IV was relatively small and uncertain in amount, and these facts explain why in the agreement made between Hollins & Company and the defendant the defendant was to be reimbursed from the proceeds of the stock and bonds when issued under Article V.

We submit that it is not a subject even for doubt that if the Board of Directors of the plaintiff by a formal resolution had requested the defendant after the execution of the Lease to proceed with the work of conversion and pay therefor out of the proceeds of the stock and bonds when issued, and that such request had been acquiesced in by the defendant, the agreement so made would not have been in contravention of any substantial provision of the Lease.

The plaintiff could have obtained thereby pre-

cisely what it was entitled to, and the defendant could have given precisely what it had agreed to give.

The plaintiff after the approval of the Lease by the stockholders of the corporation was the lessee of the property as much as it was at any other date, and if the provisions of the Lease were such that it was not at that time able to enforce its request, such provisions were ones which the defendant could waive, and when waived, as they were, they were waived for the benefit of the lessee and it could not be heard thereafter to deny that the payments made pursuant to such agreement were not made in accordance with and pursuant to the terms of the Lease.

Of course, there was not such a resolution, but it is undisputed that there was a request by the holder of all the capital stock of the lessee, and we are therefore brought back to the question argued under the *First Principal Question* of our main brief, whether such a request was not the legal equivalent of a resolution of the directors, and as the work was done with the knowledge of the corporation and its directors and delivery of the demised property was accepted by the lessee with such knowledge after the performance of the work, it is not now estopped from denying that the payments made for such work were pursuant to and in accordance with the Lease.

The facts set forth under the *First Principal Question* of our main brief show without dispute that the parties construed the Lease as we have set forth.

It is not a violation of a written instrument for a party (here the defendant) to waive a provision contained therein for its own benefit. Nor can it be said to violate the spirit or intent of an agreement for parties to agree orally to accelerate the performance of things therein agreed to be done.

The parties to the Lease were advised by able counsel and undoubtedly were told that what it was proposed to do did not violate the terms of the Lease.

If the plaintiff desired the work of conversion to proceed during the period in which the arrangements essential to be made to obtain its guarantee fund were being made, no provision of the Lease prevented it from requesting that the defendant should go on with the work and be reimbursed out of the fund set aside for that purpose in the Lease.

If the defendant chose to acquiesce in that request and advanced money on the faith of such promise with which to pay for the work of conversion, no provision of the Lease was violated by so doing.

By such an arrangement no change was made in the rights and obligations of the parties, and the plaintiff obtained at an earlier date than it otherwise would have done the very thing which it was intended by the Lease to give to it.

Upon every principle of justice the agreement made with Hollins & Co. must be upheld.

POINT III.

Plaintiff is estopped from claiming that conversion expenditure from 14th February to 6th June, 1893, should not be credited to defendant under the Lease.

It is undisputed that throughout the period 14th February to 6th June, 1893, Hollins & Co. and their counsel were urging defendant to continue its work with all speed, even going to the length of making written requests that that be done (*fol.* 5661). Under plaintiff's present claim as to the construction of the Lease every additional dol-

lar expended was so much clear loss to defendant. Yet the evidence shows, and this must have been the fact, that Hollins & Co. represented that no prejudice should result to defendant from the doing of the work, the early completion of which was of great importance to plaintiff. The work was done by the defendant for plaintiff, and plaintiff on 6th June, 1893 accepted it. And it cannot now be heard to say that the defendant *should* be prejudiced because defendant had done the work at its request.

2 Pomeroy's Equity Jur., 3rd edition,
sec. 804;

Swain v. Seamens, 9 Wall., 254;

Trustees of Brookhaven v. Smith, 118
N. Y., 634, 641;

Bank of Monongahela Valley v. Weston,
172 N. Y., 259, 266.

Plaintiff claims that defendant would have proceeded with the work at any rate. But if so, why the repeated and continued requests to hasten the work to which all the witnesses testified? To plaintiff's knowledge defendant expended moneys in the conversion of the railroads which under the Lease were to go to it, in the sum of as much as \$1,456,935.28 (findings A-2 at *fol.* 534; A-63 [wrongly printed as "60"] at *fol.* 619). And even if, as plaintiff asserts (though most wrongly, as appellant claims), the Lease did not become a contract until 6th June, 1893, we submit that plaintiff is none the less estopped from the claim that defendant should not be allowed credit for this large sum of which plaintiff exclusively received the benefit. If A and B negotiate for the sale or lease of a tract of land to be used for, say, orchard purposes, A to plant fifty acres; and while negotiations are pending the planting season arrives, and the parties agree that A may commence his planting, which if the contract is consummated shall go in satisfaction

of the work to be done thereunder ; upon which assurance A executes the contract providing for the planting of fifty acres, having already planted ten acres; we submit that no Court would sanction the injustice that A should be compelled to plant ten additional acres, or sixty acres in all. B rightly would be held estopped from refusing to acknowledge the representations made to A before the contract was signed and in reliance upon which it was consummated.

Wald's Pollock on Contracts, Williston's Ed., 790, 791 ;
O'Connor v. Green, 60 App. Div., 553 ;
Tilden v. Tilden, 8 App. Div., 99 ;
Hurley v. Atchison, Topeka & Santa Fe Ry. Co., 213 U. S., 126 ;
Union Pacific Railway Co. v. McAlpine, 129 U. S., 305, 312 ;
Ex parte Ames, 1 Lowell, 561.

But respondent claims that notwithstanding plaintiff accepted the work done prior to 6th June, 1893, it is not bound by any estoppel because Hollins & Co.'s knowledge or acts could not be imputed to it. Upon this point, however, the Referee's rulings were against plaintiff. His findings 16 at *fol.* 336, and A-51 at *fol.* 607, are as follows :

" 16. Subsequent to February 15, 1893,
 " the defendant proceeded with the work of
 " converting the demised railroads into an
 " electric railroad at and with the knowl-
 " edge of the officers and directors of the
 " plaintiff company.
 " A-51. There is no evidence that during
 " the performance of the construction and
 " conversion work done by the defendant as
 " referred to in request A-2 herein there was
 " any objection made thereto by the plain-
 " tiff or Hollins & Co., although both

“ the plaintiff and Hollins & Co. knew that
 “ the said work of construction and con-
 “ version was being done and performed by
 “ the defendant.”

Hollins & Co. were more than merely the owners or controllers of the plaintiff's entire capital stock (findings 11 at *fol.* 333 ; A-38 at *fol.* 564). They had made the original proposal for the Lease (findings 3 at *fol.* 293 ; II at *fol.* 654). They and their associates in the syndicate had named all of the plaintiff's directors (finding A-27 at *fols.* 554-556), who were most of them relatives or personal friends of members of the syndicate (Auerbach, *fols.* 5665-5668), and did not conduct any negotiations for plaintiff, being merely “figureheads” (Lewis, *fols.* 5262, 5264). Hollins and Burke of Hollins & Co., both before and after the signing of the Lease on 14th February, 1893, arranged all of the necessary business of the plaintiff corporation (Burke, *fols.* 5252, 5253; Hollins, *fol.* 5283; Lewis, *fols.* 5264, 5305). And this was done naturally and unavoidably to the knowledge of and pursuant to an understanding with the directors who had been designated by them. Hollins & Co. were, therefore, in addition to being the real parties in interest, and at the time of their requests to the defendant the *only* real parties in interest, also fully authorized by permission, and undoubtedly through express understanding with the plaintiff's directors, to conduct the business of the plaintiff corporation. This, indeed, follows from the finding of the Referee :

“ A-72. From February 14, 1893, to April
 “ 17, 1893, the affairs of the Brooklyn
 “ Heights Co. were conducted and deter-
 “ mined by Hollins & Co. or by a board of
 “ directors, the majority of whom came to be
 “ directors by the direction of Harry B.
 “ Hollins, of the firm of Hollins & Co.” (*fol.*
 625).

It has been uniformly and consistently held that where a mere agent is permitted by the directors to make representations even outside his real authority, the corporation is estopped by them (*Phillips v. Campbell*, 43 N. Y., 271; *Chambers v. Lancaster*, 160 N. Y., 342). And where the person permitted by the directors to act on the corporation's behalf is the owner of all of its stock the case for the application of this rule is far stronger, for not only has the third party acted on the agent's representations, but no one interested in the corporation has been injured.

Groh's Sons v. Groh, 80 App. Div., 85;
Sheridan Electric Lighting Co. v. The
Chatham Nat. Bank, 52 Hun, 575,
 affirmed, 127 N. Y., 517.

None of the cases cited by the respondent in any way limits or qualifies this doctrine. Although cited as if they were all to the same effect they fall into four widely different classes as distinguishable from one another as from the question presented by the facts upon this appeal:

First, the two cases of *Saranac & Lake Placid R. R. Co. v. Arnold*, 167 N. Y., 368, and *Buffalo Loan etc. Co. v. Medina Gas & Electric Light Co.*, 162 N. Y., 67, cited and extensively quoted from on pages 141-149 of plaintiff's brief, hold that the owner of all the capital stock of the corporation cannot make away with its property and devote it to his own use. In spite of the emphasis given these cases by respondent's counsel, it would seem to be almost a work of supererogation to point out that this doctrine finds no application whatever to the acts of Hollins & Co. There was no diversion of the plaintiff's property to them or to any other person, and all of the work done upon the request made in the course of their management of the plain-

tiff's affairs came to plaintiff when it took possession under the Lease.

Secondly, the cases of *Palmer v. Ring*, 113 App. Div., 643, and *Denver Engineering Co. v. Elkins*, 179 Fed., 922, cited on pages 135 and 136 of the plaintiff's brief, hold that stockholders cannot bind the corporation by contracts made in their own individual names. This is elementary law ; but no contract made by Hollins & Co. as a copartnership is attempted to be enforced against the plaintiff.

Thirdly, the cases of *Pullman Palace Car Co. v. Missouri Pacific Railway Co.*, 115 U. S., 587, and *Stone v. Cleveland, etc., Railway Co.*, 202 N. Y., 352, cited on pages 136 and 137 of plaintiff's brief, hold that the owner of the majority of a corporation's stock is not individually liable upon its contracts or for its torts. The citations seem to require no comment.

Fourthly, the case of *People ex rel. Manice v. Powell*, 201 N. Y., 194, cited on page 134 of plaintiff's brief, states the undoubted doctrine that the stockholders have no power to manage a corporation in opposition to the acts or the will of its directors. But there is here, as we have seen, no such state of facts. Plaintiff's directorate chosen by Hollins & Co. as the owner of all of plaintiff's stock, unquestionably approved of and authorized Hollins & Co. to manage its affairs. Their negotiations prior to the signing of the Lease were formally approved when the directors met for its adoption, and the directors gave no intimation that thereafter Hollins & Co. should not be competent to represent plaintiff.

POINT IV.

The Referee having construed the written Lease to mean that defendant must expend the sum of six million dollars after 6th June, 1893, irrespective of the amount expended since 14th February, 1893, committed error in refusing to find that such provision was orally modified.

Plaintiff's counsel admit the oral communications between Hollins & Co. and defendant's officers which took place after the execution of the Lease, as indeed they were bound to do, for the testimony of Messrs. Hollins, Burke and Lewis was ample and uncontradicted. But plaintiff contends that it appears from these conversations as testified to by the witnesses, that there was no thought or intention on the part of those taking part in them of making any change in, or modification of, the Lease. That there was no such specific intention may be conceded by the appellant. As we have seen, none of the parties thought or suspected that the Lease was drawn so as to embody any other contract than that outlined in the Hollins proposal; indeed no person whatever at any time before this action was commenced (if the attorney to whom reference is made in Mr. Williams' letter of 1st March, 1900, be excepted), suspected that the Lease might mean what the Referee has found it to mean. The parties who came together at different times in the period following the execution of the Lease, were not concerned, therefore, with changing their mutual rights and obligations. Those rights and obligations were deemed to be absolutely settled to the effect that defendant must expend its entire capital, and that plaintiff should pay rental on the basis of what was so expended. Plaintiff's representatives came to urge an

active going forward of the conversion work in order that the work for which defendant was to pay, and of which plaintiff was to have the benefit, might be done as soon as possible; and when the question arose as to whence the money was (physically speaking) to be derived with which to pay for the work as it was done, defendant's officers were instructed that it should be taken from "the funds which were to come to us" (*fol.* 5249). And accordingly when defendant had exhausted its stock of cash it borrowed money to continue the conversion work (finding A-41 at *fol.* 566). But granting that the intention of the parties in these conversations was merely to provide for the doing of the work and discussing the means of financing it, and that they had no thought of modifying the Lease (which, on their construction of it, was not in need of modification), nevertheless we submit that when the Referee had construed the Lease to mean something entirely different from what the parties thought it meant, he should have found that these conversations, though not in form so intended, still had the effect of altering the construction given by him to the Lease when considered apart from such conversations. It was the understanding of both the defendant and the plaintiff that the Lease was so drawn that \$18,925,000 was required to be expended by the defendant on the property, and no other or different sum. And in that case no ultimate change would result from the proposed acceleration of the work. It was certainly the *implied*, and it so happened through the accident that the parties were compelled to discuss the question of where money was to be obtained, likewise the *express* basis of their understanding to continue the work, that the work then done should be paid for out of moneys which would otherwise have gone to the

plaintiff for the doing of the same work. If, therefore, the parties (in common with everyone else until the theory adopted by the learned Referee was discovered by the plaintiff's lawyers), were wrong in their belief as to the meaning of the Lease, these conversations necessarily modified its obligations, and whether at the time specifically so intended or not. It would, we respectfully submit, lead to great injustice to hold that an oral arrangement inconsistent with a written lease should not modify it, merely because the parties thought it was consistent therewith, and for that reason alone intended no modification. In many cases effect has been given to their intentions by regarding similar acts and conversations as providing a practical construction which became binding upon the parties.

Woolsey v. Funke, 121 N. Y., 87 ;

Nicoll v. Sands, 131 N. Y., 19 ;

Tilden v. Tilden, 8 App. Div., 99.

But whether effect be given to the conferences which were held after the execution of the Lease as being a modification or a practical construction of the Lease, we submit that in either view it was erroneous to disregard the intentions of the parties which clearly appear from the testimony quoted on pages 76 to 81 of our main brief.

The technical objections urged by the plaintiff against allowing the modification were urged also before the Referee and they were accordingly fully dealt with in our main argument. For convenience we place here a synopsis of our answer to these purely technical objections with a citation of authorities quoted fully in our main brief (pages 122 to 144).

Manual delivery not required to give life to an agreement under seal.

Wigmore on Evidence, vol. 4, sec. 2408;

Sarasohn v. Kamaiky, 193 N. Y., 203;

Dietz v. Farish, 79 N. Y., 520, 525;

Bierer v. Fretz, 32 Kansas, 329, 333;

Fisher v. Hall, 41 N. Y., 416.

Provision of Article XLVII of Lease did not make the Lease the less a binding contract.

Mechanics Nat. Bank v. Jones, 76 App., Div., 534, affirmed 175 N. Y., 518.

Agreement under seal may be modified by parol as to the time of performance.

Lawrence v. Miller, 86 N. Y., 131, 139;

General Electric Co. v. National Contracting Co., 178 N. Y., 369, 375;

Solomon v. Vallette, 152 N. Y., 147;

Grange v. Palmer, 56 Hun, 481, 483.

The formalities required by the Railroad Law were dispensed with by approval of the holder of all the plaintiff's stock.

St. Louis Railroad v. Terre Haute Railroad, 145 U. S., 393;

Eakin v. St. Louis Railroad Co., 8 Fed. Cases, No. 4236, at p. 235;

Atlantic Trust Co. v. Crystal Water Co., 72 App. Div., 539, 545.

Plaintiff asserts (its brief, p. 153) that Hollins & Co. were not the owners of the entire capital stock of plaintiff, since 65 of the 2,000 shares were required to qualify the company's directors. But the Referee rightly found from the evidence that

though the 65 shares may have nominally stood in their names they were really the property of Hollins & Co. (findings 11 at *fol.* 333, A-38 at *fol.* 564). Moreover appellant has a right to rely on all of the Referee's findings in aid of its exceptions (*Elterman v. Hyman*, 192 N. Y., 113, 117; *City of Buffalo v. D., L. & W. R. R. Co.*, 190 N. Y., 84, 98); and respondent cannot attack them (*Cox v. Stokes*, 156 N. Y., 491). The findings on the subject of Hollins & Co.'s ownership are unambiguous and explicit.

" 11. On February 14, 1893, Hollins & Co.
 " were the owners of all of the capital stock
 " of the plaintiff " (*fol.* 333).

" A-38, Hollins & Co. were the owners of
 " the entire capital stock of the plaintiff
 " from before the 14th day of February,
 " 1893 until about the 17th day of April,
 " 1893 " (*fol.* 564).

Plaintiff further contends (its brief, pp. 122, 126) that since Hollins & Co., who acted for plaintiff in these conferences, were the owners of stock in the defendant company any contract made by them did not bind plaintiff. As we have shown in our main brief in our discussion of the Tripartite Agreement (pp. 191-202), it is a sufficient answer to this claim that Hollins & Co. were the owners of all of plaintiff's stock. Moreover, if plaintiff's reasoning be brought to its logical conclusion, it would follow that the Lease itself, upon which plaintiff must rely, is not a binding instrument. Plaintiff cannot disaffirm only a part of the contract. It cannot maintain a grip upon the Lease procured for it by Hollins & Co. and repudiate the dealings which were had in connection with putting it into operation, and by which it received under the Lease on 6th June, 1893, a large additional quantity of work with which under its

own contention defendant was under no obligation to furnish it. It should not be permitted to reject the understanding under which this work was carried on while retaining the benefit of the work and of the Lease itself.

Barr v. N. Y., L. E. & W. R. R. Co.,
125 N. Y., 263 ;

Duncomb v. N. Y., Hou. & N. R. R.
Co., 84 N. Y., 190 ;

Steinway v. Steinway, 2 App., Div.,
301, 306 ; affirmed on opinion below,
157 N. Y., 710.

SECOND PRINCIPAL QUESTION.

Plaintiff barred by the Tripartite Agreement.

Much stress is laid in plaintiff's brief on the fact that its directors, who for it approved the Tripartite Agreement, held stock in the defendant company. The Referee found the extent of their shareholdings in defendant to be 30,000 out of 1,200,000 shares, while, in the Long Island Traction Company (which owned the plaintiff's stock) these directors held 10,070 out of 300,000 shares (findings A-17 at *fol.* 546, 547; 2 at *fol.* 291; 30 at *fol.* 345), so that their proportionate interest in *plaintiff* ($3\frac{356}{1000}\%$) was larger than their proportionate interest in defendant ($2\frac{5}{10}\%$). There were no common directors of plaintiff and defendant, and no other stockholding interest in the controlling body was proved or found by the Referee. In our main brief we have argued (pp. 202-205), that this very small interest in defendant, not equalling even their interest in plaintiff, did not render voidable the Agreement between the plaintiff and defendant which, after an examination of the accounts, fixed the rights of the parties under the Lease, and the execution of which (unless it were voidable, as the Referee concluded), barred this action by plaintiff.

Resting this argument upon the cases cited in our main brief, we shall, however, here again submit to the Court that the question of whether the Agreement were otherwise voidable is in truth immaterial, since the action of plaintiff's directors had the approval of the holder and owner of its entire capital stock. We shall then shortly answer plaintiff's technical contentions, that there was in

fact no adjustment of accounts—a contention made in the face of the Referee's findings, that there was such examination (finding 45 at *fol.* 378), that the result thereof was shown upon the “yellow sheet” (finding A-61 at *fol.* 618), and that such result was embodied in the Tripartite Agreement and in the note given by plaintiff and the Long Island Traction Company pursuant thereto (findings A-61 at *fol.* 618 ; 60 at *fol.* 401-404 ; 61 at *fol.* 404-406).

POINT I.

The Tripartite Agreement and the promissory note given pursuant thereto having been approved and joined in by the Long Island Traction Company, the absolute owner of all of plaintiff's capital stock, is binding upon the plaintiff.

That the Long Island Traction Company, the third party in the Tripartite Agreement, owned absolutely every share of plaintiff's capital stock is found by the Referee (finding A-9 at *fol.* 538, 539). The action of plaintiff's directors in making the Tripartite Agreement, even if otherwise it had been voidable, was thus effectually approved, and all of plaintiff's constituent elements having at the time joined therein, it cannot be avoided.

Barr v. N. Y., L. E. & W. R. R. Co., 125 N.Y., 263. By GRAY, J., at p. 272 :

“ The respondent has questioned the
 “ legality, or validity, of the issue of shares
 “ upon which plaintiffs base their right to
 “ sue. I do not think it is in a position to
 “ raise that question and for several mani-
 “ fest reasons. All of the stock and bonds

“ were issued in payment for the construction of the railroad and were taken by a syndicate of persons, who assumed the contract for the work. It is true that that syndicate was made up of members of the board of directors, but, as the members of the syndicate were practically the company and composed the whole number of stockholders, there was no one to object, and the manner in which they chose to divide up their interests in the proprietorship of the corporation and to represent them in shares concerned only themselves. No principle of law forbade the company agreeing to pay for the construction of its railroad in the way or in the amount it did (*Van Cott v. Van Brunt*, 82 N. Y., 535). ”

Steinway v. Steinway, 2 App. Div., 301; affirmed 157 N. Y., 710 on opinion below. By BARRETT, J., at p. 304 :

“ Even if the directors misapply the funds of the corporation, their acts in that regard may be cured by the unanimous consent or ratification of the shareholders (Morawetz on Corporations, sec. 625, and cases there cited). * * * If the shareholders may thus ratify illegal acts of the trustees, they may agree originally that such acts shall be lawful and proper. And where they have done so, the corporation cannot complain.”

Blum v. Whitney, 185 N. Y., 232 ;

Little v. Garabrant, 90 Hun, 404; affirmed 152 N. Y., 661, on opinion below;

Skinner v. Smith, 134 N. Y., 240;

Welch v. I. & T. N. Bank, 122 N. Y., 177;

Elyea v. Lehigh Salt Mining Co., 169 N. Y., 29;

- Seymour v. S. F. Cemetery Asso.*, 144 N. Y., 333;
Inglehart v. T. I. Hotel Co., 109 N. Y., 454, 466;
Marbury v. Stone, 17 App. Div., 352; affirmed on opinion below, 160 N. Y., 701;
Bostwick v. Young, 118 App. Div., 490; affirmed 194 N. Y., 516;
Remington & Son, etc., Co. v. Caswell, 126 App. Div., 142;
Parsons v. Hayes, 14 Abb. N. C., 419;
Salomon v. Salomon & Co., L. R., 1897, A. C., 22;
In re Ambrose Lake Tin & Copper Mining Co., 14 Ch. D., 390;
Old Dominion Copper Co. v. Lewisohn, 210 U. S., 206;
Foster v. Seymour, 23 Fed., 65;
Stratton's Independence v. Dines, 126 Fed., 968;
M'Cracken v. Robison, 57 Fed., 375;
Stewart v. St. L., F. S. & W. R. R. Co., 41 Fed., 736;
Ashurst's Appeal, 60 Pa. St., 290;
Tompkins v. Sperry, Jones & Co., 96 Md., 560;
Battelle v. North Western Cement & Concrete Co., 37 Minn., 89;
Arkansas River, etc., Co. v. Farmers' Loan, etc., Co., 13 Colo., 587.

Plaintiff's counsel assert that, since the Long Island Traction Company's directors were the same men as plaintiff's, they could not ratify their own acts as plaintiff's directors; but the cases which we have cited *supra* show that where the stockholders are the same men as the interested directors, their approval of their own acts as directors binds the cor-

poration and all subsequent stockholders, so that plaintiff's general statement is clearly incorrect. And, furthermore, it was not the approval of these same men as individuals that is relied on by defendant, but the approval by the corporation which owned all of plaintiff's stock, and which was properly expressed through them. Although plaintiff's brief contains suggestions that these directors were placed in charge of the plaintiff and the Traction Company by some direct and arbitrary action on the part of the defendant company itself, the testimony shows that they were elected as directors of the Long Island Traction Company by its shareholders, at a regular election held as late as 6th March, 1894 (*fols.* 8144, 8145). Whether the Long Island Traction Company could have taken steps to avoid the Tripartite Agreement is not in question here, but its consent having been given by its duly constituted authority, whose action it never avoided or attempted to avoid, the Agreement remains completely binding.

To support its position, plaintiff cites five cases (its brief, pp. 333, 334), none of which announces any principle in conflict with the cases cited at pp. 43, 44, *supra*, or which is at all applicable to this case.

In *McNulta v. Corn Belt Bank*, 164 Ill., 427, cited by plaintiff at p. 333 of its brief, it was held that subscribers to the stock of the defendant bank, who had paid nothing on their subscriptions, were not stockholders, and consequently had not the power to ratify an *ultra vires* contract made by its president.

The other four cases cited by plaintiff on p. 334 of its brief, *Fort Dearborn Nat. Bank of Chicago v. Seymour*, 71 Minn., 81; *Lilly v. Hamilton*, 178 Fed., 53; *Hill v. Opalite Tile Co.*, 184 Fed., 450; *American Surety Co. v. Pauly*, 170 U. S., 133, hold that the knowledge of an agent is not imputed

to his principal when such knowledge would disclose to his principal that the agent was defrauding him. Plaintiff does not attempt to set forth how these authorities are deemed to be in any way relevant, and it is difficult to see what possible bearing they have on the consent given by the Long Island Traction Co. That Company, although owning all of plaintiff's capital stock, was entirely independent and separate from it, and its acts are not imputable to plaintiff nor are plaintiff's acts imputable to it.

Noyes on Intercorporate Relations, 2nd ed., sec. 284 :

“ The lawful acquisition by one corpora-
 “ tion of stock in another—even to the ex-
 “ tent of holding all its shares—in no way
 “ affects the legal entity of the two corpo-
 “ rations, as between themselves, and each
 “ continues its separate existence. This is
 “ an application of the rule—necessary in
 “ the relations between a corporation and
 “ its stockholders, and between a corpora-
 “ tion and third persons,—that a corpora-
 “ tion is an entity distinct and apart from
 “ its stockholders.”

POINT II.

The settlement of accounts, the Tripartite Agreement, and the giving of the \$308,340.35 note are a complete bar to this action.

The Referee found that there was an examination of the accounts between the parties and that the yellow sheet embraced the results of that examination. This, as the Tripartite Agreement recites, shows an indebtedness from plaintiff to defendant of \$308,340.35. For that sum thus shown to have been presently due, defendant accepted a

promissory note, which postponed the day of payment. Under the well-known authorities cited in our main brief (pp. 189, 190), this completed a binding settlement; and no recovery can be had on the original contract.

Against this plain conclusion we understand plaintiff to urge (1) that there was no intention to make a binding settlement (its brief, pp. 288-291); (2) that if there were such intention, it was not executed (its brief, pp. 297-314); (3) that, although the Referee found otherwise, and the physical proofs thereof form a part of the record, there was no accounting at all between the parties (its brief, pp. 314-331). We shall reply to these questions in the order in which plaintiff has raised them.

1. The Tripartite Agreement effected a complete settlement.

From the terms of the Tripartite Agreement itself it conclusively appears that it was to embody the final settlement between the companies. Not only did it provide that the amount of the ascertained indebtedness of the Heights Company to the City Company should be incorporated in a note for that sum, payable on 1st August, 1897, or sooner, after 1st July, 1895, at the option of the makers (Art. Third, at *fols.* 212-216); but it further provided that *all* outstanding obligations of the defendant, including

“ any balance due or to become due, on
 “ contracts made by it, for the construc-
 “ tion, conversion and equipment as electric
 “ railroads of said railroads demised by it to
 “ said ‘ Heights Company ’ and any balance
 “ due by it as of date of June 6th, 1893 *for*
 “ other purposes ” (*fol.* 216)

and amounting to \$347,036.44 “ or thereabouts,” should be paid out of moneys to be loaned by de-

fendant, which were to be repaid to it with interest (Arts. Fourth, Fifth and Sixth, at *fols.* 216-219). No more complete and absolutely final settlement could be devised. Defendant was to be repaid the amount of its over-advances ; and to protect it forever after against making further payments and against any question as to whether further payments should be made by it, all of its outstanding obligations, whether incurred in conversion or *for other purposes*, were to be paid for it by plaintiff and the Traction Company, they borrowing the money to do so from defendant on amply secured notes bearing six per cent. interest. We submit, therefore, that any contention that the Tripartite Agreement did not conclusively determine and settle the reciprocal financial obligations of plaintiff and defendant must be rejected. It was plainly intended to, and by its terms it did, conclude once and for all the question of what payments should be made to one another by the parties thereto.

Plaintiff makes some question (its brief, pp. 289, 290), concerning the recital of the Tripartite Agreement, that the

“ Heights Company is indebted to said
 “ Brooklyn Company in large sums of money
 “ for advances made to it by said Brooklyn
 “ Company in and about the conversion of
 “ said demised railroads into an electric rail-
 “ road and the equipment of the same as
 “ such *in anticipation of the sale of certain*
 “ *real estate and personal property of the*
 “ *Brooklyn Company*, which under the
 “ terms of the lease, were to be sold and the
 “ proceeds applied to such electrical con-
 “ struction and equipment ” (*fol.* 206).

It comments that

“ There is no hint of defendant’s present
 “ claim, that it had ever paid plaintiff out

“ of its moneys, credits and securities,
 “ thereby depleting its surplus under Art.
 “ IV of the lease ” (p. 290).

The meaning of the provision is clear. Under Art. XLV of the Lease, such of the real property demised as would become useless to the converted railroad was to be sold by the lessor (*fol.* 126, 127), and the proceeds were to be expended by it

“ for the same purposes as in this lease
 “ provided for the expenditure of the pro-
 “ ceeds of the stock and bonds of the lessor ”
 (*fol.* 127).

The calculation on the “ yellow sheet ” which, as the Referee found, was the basis for the Tripartite Agreement (finding A-61 at *fol.* 618), showed that defendant had advanced out of its surplus the sum of \$308,340.35. This had been done, not to furnish a gift to plaintiff, but, as the Agreement recited, in anticipation of the speedy sale of real estate under Art. XLV, from the proceeds of which defendant would be reimbursed for its advances. Such speedy sale not having occurred, defendant was repaid the debt through the medium of the Tripartite Agreement.

It was, in fact, for the reason that in the panic times of 1894 and 1895, plaintiff and defendant could not realize on the real estate which was held under the Lease (*fol.* 5493, 5494, 5499), and the proceeds from which would have gone into the conversion work (Art. XLV at *fol.* 127), that the Long Island Traction Co. was compelled to seek the aid of the loans, the failure to meet which caused the foreclosure of its properties.

2. *The settlement was completely executed.*

Plaintiff and the Long Island Traction Company gave their note for \$308,340.35 pursuant to the

Tripartite Agreement, which note was paid (findings 60, 61, 62 at *fol.* 401-407; 74 at *fol.* 422); and defendant loaned to plaintiff and the Traction Company the money with which all of its outstanding obligations were to be paid, and from which they were paid by the Disbursing Committee (findings 63 at *fol.* 408; A-20 at *fol.* 549, 550). The entire settlement was, therefore, executed in all of its parts.

Plaintiff's contention that it was not executed is based upon these almost recklessly erroneous statements in its brief (p. 301):

“At this time defendant had advanced
 “only \$350,000 out of the \$1,375,000 which
 “it agreed to advance in the tripartite
 “agreement (*fol.* 210), so that defendant
 “was itself in default in performance of
 “that part of the agreement most vital to
 “plaintiff, yet it declared plaintiff in de-
 “fault in an immaterial matter, and plain-
 “tiff's faithful officers made no protest.”

Plaintiff misstates the provisions of the Tripartite Agreement. From the \$1,375,000, the limit of the amount to be loaned by the defendant, there was first to be deducted the recited \$308,340.35 of indebtedness to it, leaving \$1,066,659.65 to be advanced in cash (Art. Third, at *fol.* 215). This whole sum was not to be advanced absolutely, but only in the following order (Art. Twelfth at *fol.* 232, 233):

1. On account of the defendant's conversion and other obligations, the sum of \$347,036.44.
2. On account of real estate held by plaintiff under the lease.

Note: Art. Ninth (*fol.* 225-227) provided that when real estate covered by the lease and no longer necessary for the railroad was released from the lien

of the lease and of a mortgage held by the Kings County Trust Co., then defendant should make loans to plaintiff and the Traction Company in anticipation of its sale up to its appraised value.

3. Any sum which *after* the above advances might be needed to make up the sum of \$1,375,000.

No moneys, therefore, were to be advanced by defendant after its direct obligations were disposed of except upon the pledge of the unused real estate when released from the Kings County Trust Company's mortgage; and there is not a shred of evidence, nor is it pretended, that this was ever done, or that real property was presented to defendant for the making of a loan thereon. Defendant performed precisely every obligation imposed upon it by the Tripartite Agreement; and the Agreement itself was fully executed, except for plaintiff's own default which, its counsel says, was in an "immaterial matter." It is, we submit, clear that, if A promise for a consideration to build a house, and likewise to build a stable if the owner shall require it; and A builds the house but not the stable, because the owner does not require it; then A's contract is fully executed and in no sense executory, for he has fully performed in every respect according to the terms of the contract.

Plaintiff's default was not in an "immaterial matter." When plaintiff had made default in the payment of rental under the Lease recourse had been had to the guaranty fund of \$4,000,000 as the Lease provided (Art. XXXVII, at *fol.*s. 114-116). Plaintiff covenanted in the Tripartite Agreement that the depleted guaranty fund should be restored at the rate of \$4,500 a day, and that, if plaintiff should default in the performance of this covenant

for the period of forty-five days, then all obligations on defendant's part to continue the making of advances should cease (Art. Twenty-second, at *fol.* 250-254). It was in this—to defendant—most material matter that plaintiff made its default (*fol.* 5849).

3. There was an accounting between plaintiff and defendant to determine their respective obligations under the Lease.

The Referee found the fact of the accounting (the evidence of which we have summarized on pages 149-178 of our main brief) as follows :

“ That during the year 1894 there was an
 “ examination of the accounts of the plain-
 “ tiff and defendant which led up to and
 “ embraced the so-called tripartite agree-
 “ ment attached to the Answer of the de-
 “ fendant and marked Exhibit A ; that at
 “ the time of the execution of said tripartite
 “ agreement, both corporations, the plaintiff
 “ and defendant, were controlled by sub-
 “ stantially the same interests and set of
 “ men, and that the alleged adjustment of
 “ accounts between the Companies was made
 “ from the book entries appearing upon the
 “ books of account of the plaintiff and de-
 “ fendant respectively, and that, upon such
 “ books of account appeared and was taken
 “ into consideration moneys expended by
 “ the defendant in the construction and in
 “ converting its road into an electric rail-
 “ road prior to 6th June, 1893 ; and there
 “ also appeared upon such books, and were
 “ taken into consideration upon such ac-
 “ counting, many items charged to construc-
 “ tion which were not properly so charged,
 “ and the moneys therein set forth had not
 “ been expended for the purpose of construc-
 “ tion or converting the railroad in question
 “ into an electric railroad and such books
 “ of account did not exhibit a true and cor-

“ rect statement of accounts between the
 “ plaintiff and defendant of moneys that
 “ had been expended for the purpose of con-
 “ structing and transforming the said rail-
 “ road into an electric railroad ” (*fols.* 378-
 380).

Upon this Finding, as well as upon the evidence, the *fact* of the accounting, which respondent seems to question, cannot well be disputed. The Referee found, not only that there was an examination of accounts, but further found generally as to the matters that were taken into consideration by the accounting parties—conversion expense accrued before 6th June, 1893 (and this, as we have argued, was most wrongly left out of account by the learned Referee), and certain entirely unidentified amounts which were not, as the Referee deemed, proper construction charges. Even if the accounting embraced erroneous items or were conducted on an erroneous legal theory (though we submit that it was not), yet that would not detract from its force as an accounting (*Jackson v. Volkening*, 81 App. Div., 36, affirmed 178 N. Y., 562); nor does the fact that both parties recognized the account when drawn up as correct, and that they did not dispute or haggle over it, render it any the less a binding statement of their obligations (*Goodrich v. Sanderson*, 35 App. Div., 546).

Plaintiff finally criticizes the account on the ground that it does not purport to show the expenditure of any specific fund of \$6,000,000, but was based on a comparison of the assets on hand with the amount of surplus shown to exist on defendant's books. A deficit in the assets, when compared with the surplus, showed conclusively that the full \$18,925,000 capital had been expended, and, in addition, a portion of the surplus (main brief, pp. 175-178). It was, as plaintiff correctly says, the basis of the adjustment that to it should

be given a road upon which defendant had expended the full sum of \$18,925,000, but nothing more, and that defendant should have all of its surplus (respondent's brief, pp. 269-282). But that the accounting was made, not on the theory of plaintiff's counsel, but on an entirely different, and, as we earnestly submit, an entirely correct theory, cannot make it nugatory.

POINT III.

Plaintiff is barred by *laches* from seeking an avoidance of the Tripartite Agreement.

That a contract made for a corporation by interested directors is voidable only in equity and will not be avoided where there has been *laches* in attempting to secure its avoidance, is shown by the authorities on our main brief (pp. 191-193, 207-209).

Twin Lick Oil Co. v. Marbury, 91 U. S., 587;

Barr v. N. Y., L. E. & W. R. R. Co., 125 N. Y., 263;

Foster v. Mansfield Co., 146 U. S., 88;

St. Louis Co. v. Terre Haute Co., 145 U. S., 393;

Drake v. Suburban Co., 26 App. Div., 499;

Ashurst's Appeal, 60 Pa. St., 290;

Stetson v. Northern Co., 104 Ia., 393.

Plaintiff's counsel did not dispute that there was a delay of five years, from 1895 to 1900, in bringing suit, and that, during all this long time, plaintiff's present officers were aware of the Tripartite

Agreement and of the notes which had been given and paid thereunder (*fols.* 4770, 4771); and they knew, of course, that plaintiff's former directors had held stock in defendant, and had before the Lease was made been officially connected with it. When, in 1897, plaintiff thought of examining the accounts, such investigation as was made was only fitful and "at odd hours" (*fol.* 4796).

In reliance upon the certain rental prescribed in the Lease, which guaranteed the payment annually of 10% dividends, defendant's stock was meanwhile sought as an investment by those corporations and individuals dependent upon an absolutely steady and reliable income. It would surely be inequitable to permit plaintiff, after an utter supineness extending over at least five years, to upset the instrument which had settled completely defendant's obligations and fixed its financial status, and upon the credit of which its stock had been purchased by sheer investors for the sake of its stability.

But while plaintiff does not deny these facts established by the evidence of its own witness, it rests upon the findings of the Referee, that plaintiff employed due diligence, made contrary to this evidence, and to which exceptions were duly taken by the defendant (findings XLVIII, XLIX at *fols.* 704, 705; exceptions 50th, 51st at *fol.* 785). It rests further upon the astounding assertion that "the question of laches, however, cannot be raised "in this state, in any event" (its brief, p. 340). It is a bold assertion that a court of equity in this State will act inequitably to aid those who by their supineness (short of the period of the Statute of Limitations) have induced conduct on the part of others; but the authorities show amply that equity then refuses relief.

Calhoun v. Millard, 121 N. Y., 69. Action to cancel bonds. By ANDREWS, J., at p. 82:

"But a period of nine years had elapsed

“ after the bonds were issued, before the
 “ commencement of the action. But we ap-
 “ prehend that the period of limitation of
 “ equitable actions, fixed by the statute, is
 “ not where a purely equitable remedy is in-
 “ voked, equivalent to a legislative direc-
 “ tion that no period short of that time shall
 “ be a bar to relief in any case, or precludes
 “ the Court from denying relief in accord-
 “ ance with equitable principles for un-
 “ reasonable delay, although the full period
 “ of ten years has not elapsed since the
 “ cause of action accrued. * * * In en-
 “ forcing purely equitable remedies, depend-
 “ ing upon general equitable principles, un-
 “ reasonable and inexcusable delay is an
 “ element in the plaintiff’s case, which a
 “ court always takes into consideration in
 “ exercising its discretion to grant or refuse
 “ relief, and is not a mere collateral inci-
 “ dent.”

Penrhyn Slate Co. v. Granville Co., 181 N. Y.,
 80. Action for an injunction. The Court, citing
 the opinion of the United States Supreme Court in
New York City v. Pine, 185 U. S., 93, said, by
 BARTLETT, J., at p. 90 :

“ ‘ The time at which parties invoke the
 “ ‘ aid of a court of equity is often a signifi-
 “ ‘ cant factor in determining the extent of
 “ ‘ their rights. ‘ *Vigilantibus non dor-*
 “ ‘ *mientibus æquitas subvenit* is a maxim
 “ ‘ of equity.’ The principle stated by the
 “ learned justice is supported by an abun-
 “ dance of authority.”

Darrow v. Bush, 45 App. Div., 262. Action for
 specific performance. By ADAMS, J., at p. 266:

“ The statute of limitations does not affect
 “ the general principles of equity, which de-
 “ clare that where a party, in attempting to
 “ enforce his rights, is guilty of unreason-
 “ able and inexcusable delay, he should be

“denied equitable relief, although the lapse
“of time may not be sufficient to bring the
“case within the operation of the statute.”

Boyer v. East, 161 N. Y., 580. Action to cancel deed of purchase by trustee from trust estate.
By GRAY, J., at p. 586:

“The defendants had the right to invoke
“the equitable doctrine that, as the plaintiffs
“had slept so long upon their rights,
“they should be deemed to have waived the
“right to attack the title acquired through
“their mother’s purchase and conveyance.”

THIRD PRINCIPAL QUESTION.

The Tripartite Agreement if voidable at all by plaintiff, is not so voidable in this suit.

The Tripartite Agreement, if voidable at all, was voidable only by an action in equity.

Barr v. N. Y., L. E. & W. R. R. Co.,
125 N. Y., 263, 277 ;

*The U. S. Rolling Stock Co. v. The
Atlantic & Great Western Railway
Co.*, 34 Oh. St., 450 ;

*Little Rock & Fort Smith Ry. Co. v.
Paige*, 35 Ark., 304 ;

2 *Machen, Corp.*, sec. 1570.

10 *Cyc.* 818.

Respondent asserts that the Agreement having been pleaded as a complete bar to the action, it may yet be disregarded under section 522 of the Code of Civil Procedure, which provides that—

“ New matter in the answer * * * is
“ to be deemed controverted by the adverse
“ party by traverse or avoidance as the case
“ requires.”

But this section does not allow a recovery where the relief, if any, to be had against the matter set up by the answer can be had only in an action brought for that purpose. For such recovery would result in a judgment upon a new cause of action not pleaded in the complaint.

Allison v. Abendroth, 108 N. Y. 470 ;
Stevens v. Meriden Britannia Co., 160
N. Y., 178 ;

Gilroy v. Everson Hickok Co., 118
App. Div., 733, affirmed 190 N. Y.,
551 ;
Hall v. La France Fire Engine Co.,
158 N. Y., 570 ;
Dugan v. Denyse, 13 App. Div., 214.

Plaintiff cites authorities to the proposition stated by it at p. 340 of its brief, that

“where a writing is set up in avoidance
“or defense in an answer, it may be attacked
“in any manner without further pleading.”

But in all of the cases cited by plaintiff the written instrument pleaded was disregarded on the ground of actual fraud, so that no suit was required to set it aside, and they do not vary the rule as finally stated in *Smith v. Ryan*, 191 N. Y., 452, by CULLEN, *Ch. J.*, at p. 456 :

“There are cases of constructive fraud and
“those arising from false representations of
“a promissory character *in which relief can*
“*be had only in equity.* Where, however,
“the fraud is of such a nature as *would*
“*sustain a common law action of deceit,*
“it may safely be said that the contract
“may be avoided either at law or in equity
“at the election of the defrauded party.”

The Tripartite Agreement was not disregarded by the Referee on account of actual fraud, but solely because of the fiduciary relation existing between the plaintiff and its directors and because of their stockholding interest in defendant (findings L, LI at *fols.* 705-707).

It has been specifically held by this Court that an instrument, even when voidable in equity for such reason, is a valid defense to an action at law.

Dugan vs. Denyse, 13 App. Div., 214.

Plaintiff's counsel at several places in their brief (p. 206, also headnote, p. 244) make the wholly unwarranted assertion that the Referee found that there was actual fraud. The Referee did find:

“ The alleged adjustment of accounts was
 “ made from the book entries appearing
 “ upon the books of account of the plaintiff
 “ and defendant, * * * and such books
 “ of account did not exhibit a true and cor-
 “ rect statement of accounts between the
 “ plaintiff and defendant, of moneys that
 “ had been expended for the purposes of con-
 “ structing and transforming the said rail-
 “ road into an electric railroad ” (fols. 379-
 “ 380) ;

and because of this view of the Referee, that defendant's books were in certain particulars incorrect (and with this we have fully dealt in the *Seventh Principal Question* on our main brief, at pp. 297-336), the Referee was bound to refuse defendant's requests 25 and 26, as follows :

“ 25. That there is no evidence in this
 “ case that any of the entries in the books of
 “ account of defendant are *false*, fictitious
 “ or fraudulent entries ” (fol. 342).

“ 26. That the books of account and the
 “ entries therein were kept and made in the
 “ regular and ordinary course of business ”
 (fol. 342).

No testimony was introduced even tending to show that there was an intention to defraud on the part of those who framed and adopted the Tripartite Agreement; nor did plaintiff make any request to the Referee to find that there was fraud of any kind. Nor is there a single word in the decision of the Referee, or in any of his findings, which imputes any intention to defraud to the plaintiff or to the defendant. Upon the principles stated in the

authorities, *supra*, therefore, the Tripartite Agreement is a complete defense in this action.

The Long Island Traction Company, one of the parties to the Agreement, is not a party to this suit, and for this additional reason there is no power in the Court to avoid the Agreement made by it as the owner of all the plaintiff's capital stock.

Metropolitan Co. v. Manhattan Co., 11

Daly, 373, by VAN BRUNT, J., at p. 436 ;

Osterhoudt v. Board of Supervisors, 98

N. Y., 239, by ANDREWS, J., at p. 234 ;

Steinbach v. Prudential Insurance Co.,

172 N. Y., 471.

FOURTH PRINCIPAL QUESTION.

Defendant's complete compliance with plaintiff's requests for expenditure made under the Lease.

Article V of the Lease provides that the proceeds of the \$6,000,000 additional stock and bonds to be issued by defendant should (Lease, *fol.* 70, 71)

“ be expended by the lessor in payment,
 “ *at the request of the lessee* from time to
 “ time, of the cost of converting the rail-
 “ roads of the lessor into an electric rail-
 “ road.”

This action has been brought by plaintiff to recover the sum of \$2,000,000 alleged in the complaint to have been expended out of its own funds, prior to 30th September, 1894, in payment of the cost of converting the railroads demised into an electric railroad (*fol.* 29) ; that

“ plaintiff had from time to time, at
 “ various times prior to September 30, 1894,
 “ *demande*d and *requeste*d the payment by
 “ the defendant to the plaintiff of the said
 “ sum of two million dollars (\$2,000,000),
 “ which payment would have been an ex-
 “ penditure by the defendant in payment of
 “ the cost of converting the said demised rail-
 “ roads into an electric railroad as the de-
 “ fendant had agreed to do in and by said
 “ lease ” ;

but that defendant had not paid said sum, for which plaintiff demanded judgment (Complaint, par. VII at *fol.* 29-31).

These allegations were all denied by the answer (Answer, par. VI at *fol.* 167), except the al-

legation that defendant had not paid the sum of \$2,000,000.

Though such allegation of the complaint, that that plaintiff had requested the expenditure of the sum sued for by it, was directly denied by the answer, there is no evidence of any request; indeed, the evidence showed, and the Referee found, that there was no such request. Plaintiff in its brief before this Court concedes that no request was made by it on defendant with which defendant did not comply. Plaintiff claims only and inconsistently (1) that a request was waived, and (2) that a request was admitted by the answer.

POINT I.

Plaintiff's request was a condition precedent to its right of action.

Plaintiff's contention before this Court, that the request, which was alleged in the complaint, was in fact excused by circumstances, is inadmissible under the pleadings.

Article V of the Lease provided that the lessor should expend \$6,000,000 in payment, at the request of the lessee, from time to time, of the cost of conversion (*fols.* 70, 71). The request was plainly essential because, under Art. XXII of the Lease, it was plaintiff that was to proceed with the work of conversion (*fols.* 94, 95). Defendant, after possession had been taken by plaintiff, had no further business with the work itself, and was merely to pay for what plaintiff caused to be done. Under such circumstances, notification and request became an inevitable necessity before any obligation to make payment could arise.

Nelson v. Bostwick, 5 Hill, 37, by COWEN, J.,
at p. 42 :

“ There was no precedent duty upon him
“ independently of the words of the con-
“ dition, and he might prescribe such pre-
“ liminaries to his liability as he pleased. A
“ bond to pay a *precedent debt*, on demand,
“ is satisfied by the commencement of the
“ suit itself, which is considered a sufficient
“ demand ; but in case of any engagement
“ to pay a sum *on demand*, or *on request*,
“ not itself due independently of the con-
“ tract, the terms of the contract must be
“ pursued. A demand, with time and place,
“ must then be averred, and the averment
“ cannot be satisfied without proof of an
“ actual demand.”

First Nat. Bank v. Story, 200 N. Y., 346, by
VANN, J., at pp. 354-355 :

“ The intention of the parties should
“ govern, and if the terms had been to pay
“ ‘on demand and not otherwise’ there
“ would have been no doubt as to that in-
“ tention ; yet it seems to me that, logically,
“ the meaning of the instrument in its pres-
“ ent form is the same as if the form sup-
“ posed had been used. How would the ob-
“ ligor express his intention ? He might
“ promise to pay only on demand, or after
“ due demand, or provided a demand is first
“ made, but unless this was meant, what
“ was meant by the promise as made ? Why
“ was the word ‘demand’ used ? What
“ function has it to perform ? Can it be
“ disregarded and yet effect given to the in-
“ tention of the parties ? Can it be held
“ that the meaning would be the same with-
“ out it as with it ? Can it be logically said
“ that a promise to pay on demand differs
“ in no legal aspect from a promise to pay
“ without a demand ? * * *

“ As according to the promise nothing was
“ payable except on demand, there could be

“ no breach until demand made. ‘ When
 “ ‘ there is a duty which the law makes
 “ ‘ payable on demand there need be none
 “ ‘ alleged, but otherwise where there is no
 “ ‘ duty until a demand.’ ”

Bunn v. Lett, 65 Hun, 43.

Plaintiff claims in this Court that a request by it was waived through the conduct of defendant ; but no waiver or facts excusing a request are set forth in its complaint, which alleges the making of the request for the moneys for which plaintiff sues as a part of the cause of action (Complaint, par. VII at *fol.* 30), and this allegation was denied by the Answer (par. VI at *fol.* 167). It is, therefore, under the pleadings, not open to plaintiff to claim that a request was excused.

Stern v. McKee, 70 App. Div., 142, by McLAUGHLIN, J., at p. 146 :

“ The plaintiff, therefore, having alleged
 “ performance, was bound to establish that
 “ fact, and failing to do so, no recovery could
 “ be had (*La Chicotte v. Richmond R. & El.*
 “ *Co.*, 15 App. Div., 380 ; *Schnaier v.*
 “ *Nathan*, 31 *id.*, 225 ; *McEntyre v. Tucker*,
 “ 36 *id.*, 53 ; *Cox v. Halloran*, 64 *id.*, 550).
 “ But in this connection it is suggested that
 “ the recovery can be upheld upon the theory
 “ that Shainwald was excused from full per-
 “ formance by reason of the defendants’ re-
 “ fusal to proceed. This cannot be done for
 “ the reason that there are no appropriate
 “ allegations in the complaint which would
 “ permit a recovery upon that ground. The
 “ plaintiff having predicated his right to re-
 “ cover on the breach of the agreement, was
 “ bound to allege and prove performance on
 “ the part of his assignor, or an excuse for
 “ non-performance, and if an excuse were
 “ relied upon, then he was bound to allege
 “ facts constituting such excuse, and, in ad-
 “ dition thereto, that he was at that time

“ ready and had the ability to perform, and
 “ would have done so except for the acts of
 “ the other parties to the contract.”

La Chicotte v. Richmond R. & El. Co., 15 App. Div., 380, by O'BRIEN, J., at p. 384 :

“ The complaint alleged performance of
 “ the contract, and over the defendant's ob-
 “ jection plaintiff was allowed to prove, not
 “ performance, but excuses for not perform-
 “ ing the work in accordance with the con-
 “ tract. This question has been many times
 “ before the court, and the authorities all
 “ hold that it is an elementary rule of plead-
 “ ing that when the plaintiff alleges per-
 “ formance of a contract he must prove per-
 “ formance. He cannot excuse non-perform-
 “ ance and recover, because a strict com-
 “ pliance with the obligations of the con-
 “ tract has been either waived or prevented
 “ by the defendant.”

POINT II.

**There was no act or omission by defendant
 which obviated a request by plaintiff.**

The Referee refused plaintiff's request XLIII
 (*fol.* 700, 701), that in March, 1894,

“ defendant by resolution of its board of
 “ directors refused to advance any further
 “ funds to the plaintiff on account of the
 “ conversion of defendant's railroads from
 “ horse to electricity.”

The Referee found, on the contrary (finding
 A-14 at *fol.* 543), that

“ Plaintiff did not, until after the year
 “ 1894, make any claim that there was any

“sum of money due by defendant to it under
 “the lease dated 14th February, 1893, other
 “than sums which were paid by defendant
 “to plaintiff before the end of 1894.”

We understand plaintiff to complain of such refusal and such finding; but plaintiff certainly is concluded by them here (*Cox v. Stokes*, 156 N. Y., 491).

The findings are, moreover, strictly in accordance with the facts. Plaintiff sets forth as the basis of its contention, the following extract from the minutes of the meeting of defendant's Executive Committee held on 17th March, 1894 (*fol.* 7314):

“Mr. Daniel F. Lewis, President of the
 “Brooklyn Heights Railroad Company, met
 “the Committee at its request, for the pur-
 “pose of conferring upon financial condi-
 “tions of mutual interest to the companies
 “represented. It was decided that for the
 “present it was advisable that the Brooklyn
 “City Railroad Company should retain in
 “its possession such cash funds as it now
 “held.”

Here there was no refusal of any request that defendant advance moneys pursuant to the provisions of the Lease. It appears, indeed, that Mr. Lewis appeared at the request of defendant's committee itself, and not for the purpose of making any demands on the committee. Both parties, as plaintiff itself points out (its brief, p. 422) realized that the Brooklyn City funds were exhausted, and the declaration of the Executive Committee was not to the effect that it would refuse to consider any claims made by the plaintiff under the Lease, but that defendant should not at that time make loans to plaintiff over and beyond its obligations thereunder.

It is scarcely necessary, in view of the fact that there is no evidence to which they can apply, to

comment upon the authorities cited by plaintiff. It may, however, be noted that, in *Robinson v. Bank of New Berne*, 95 N. Y., 637, cited at p. 430 of respondent's brief, a demand had been made by plaintiff's assignor and the court held only that there need not be a second demand after the assignment; that *Clark v. Crandall*, 3 Barb., 612, cited by plaintiff at p. 427, was a case where performance by the defendant had become impossible; and that *Reading v. Lamphier*, 9 N. Y. Supp., 596 (respt.'s brief, p. 425); *Howard v. France*, 43 N. Y., 593 (respt.'s brief, p. 427); *Walsh v. Osterlander*, 22 Wend., 178 (respt.'s brief, p. 428), and *Sharkey v. Mansfield*, 90 N. Y., 227 (respt.'s brief, p. 428), were all cases in which it was held that a demand or request was not a necessary element of the cause of action sued upon.

In each of the other cases cited (*Carroll v. Cone*, 40 Barb., 220; *Korneman v. Fred Howard Brewing Co.*, 4 Misc., 299, and *Moore v. Craig*, 4 N. Y. Supp., 339), there was action by the defendant in derogation and defiance of a claim made by plaintiff; while in this case plaintiff made no claim that anything further was to come to it under the Lease, and both parties understood, and gave one another to understand, that defendant's obligation to expend had been fully met. Clearly defendant had done nothing which would excuse plaintiff from making the necessary request, if plaintiff should later decide that defendant, under Art. V, was, after all, liable upon request to pay for cost of conversion sums in addition to those which had theretofore been requested of it, and which it had paid.

Plaintiff relied further to excuse it from the making of a request, upon the fact that, down to 14th January, 1896, some of its directors held stock in the defendant company. We submit that it is unheard-of doctrine, and plaintiff cites no authority for it, that, if there be a contract between two cor-

porations, A and B, and the directors of Company A own some stock in Company B, that Company A can recover *upon the contract*, in an action at law; whether it have performed its conditions precedent or not. Whatever remedy a corporation might have against directors who failed through negligence or bad faith to maintain its rights, it is plain that the other party to the contract could not be bound except in accordance with its terms. In no event, however, could this excuse avail beyond a reasonable time after 14th January, 1896, when an entirely different board of directors assumed the management of plaintiff.

POINT III.

The Answer contains no admission of any request not complied with by defendant; on the contrary, the allegation of the complaint to that effect was specifically denied.

As we have already seen, this action was brought to recover the sum of \$2,000,000 (*fol.* 33) which plaintiff alleged had been expended by it

“ out of its own funds * * * in pay-
 “ ment of the cost of converting the railroads
 “ so demised into an electric railroad, which
 “ expenditure by plaintiff was over and
 “ above all expenditures made by the de-
 “ fendant for such purpose * * * and
 “ the plaintiff had from time to time at
 “ various times prior to September 30, 1894,
 “ demanded and requested the payment by
 “ the defendant to the plaintiff of the said
 “ sum of two million dollars (\$2,000,000),
 “ which payment would have been an ex-
 “ penditure by the defendant in payment of
 “ the cost of converting the said demised
 “ railroads into an electric railroad as the

“ defendant had agreed to do in and by said
 “ lease ; but the defendant failed, neglected
 “ and refused to pay the said sum of two
 “ million dollars (\$2,000,000) or any part
 “ thereof ” (*fol.* 29-30).

These allegations defendant denied (*fol.* 167);
 and it therefore directly put in issue the fact that
 a request had been made upon it for moneys

“ over and above all expenditures made
 “ by the defendant ”

and which

“ under and by virtue of the provisions of
 “ the said Lease defendant had agreed to
 “ pay to the plaintiff.”

The position of defendant throughout the whole
 of this case was accurately set forth in its pleading
 —(1) that it had fully performed the obligation
 created by the Lease, to apply certain moneys in
 payment of the cost of conversion, and had ex-
 pended all of the moneys which it had been re-
 quested to expend for that purpose ; and (2), that
 no request had ever been made upon it to make
 any expenditures which it had not made—and this
 second proposition the denial of the answer to
 which we have called attention makes perfectly
 plain.

It is in the allegations of the Answer upon the
 first proposition that plaintiff finds the admission
 of a request—but the admission is that of a request
 complied with by defendant, and not of one not com-
 plied with which, as we have seen, is specifically
 denied.

Defendant's allegations were as follows:

“ That during the continuance of said in-
 “ junction the defendant, with the knowl-
 “ edge, approval and consent of the plaintiff,
 “ and at its request, continued the work of

“ converting the said railroad and railroads
 “ in the complaint and lease mentioned,
 “ into an electric railroad, and continued to
 “ advance and expend money out of its own
 “ funds for that purpose with like knowl-
 “ edge, approval and consent of the plaintiff
 “ *and upon like request*” (*fols.* 180, 181).

“ Defendant admits the allegations in said
 “ paragraph of the complaint numbered
 “ ‘VI’, that the plaintiff from time to time,
 “ prior to September 30, 1894, requested the
 “ expenditure by defendant of the sum of six
 “ million dollars (\$6,000,000) in payment of
 “ the cost of converting the railroads so de-
 “ mised into an electric railroad” (*fol.* 163);
 “ defendant avers upon information and
 “ belief, that, prior to September 30th, 1894,
 “ and prior to the commencement of this
 “ action, it had expended a sum largely in
 “ excess of six million dollars (\$6,000,000),
 “ in part payment of the cost of convert-
 “ ing the said railroads so demised into elec-
 “ tric railroads” (*fol.* 165).

The Referee found that, subsequent to 14th February, 1893, defendant had expended on conversion the sum of \$6,400,527.14 (finding A-36 at *fols.* 560, 561); and the Referee likewise made findings (A-14 at *fol.* 543; A-44 at *fol.* 582), that no additional sums were requested by plaintiff to be expended by defendant. It is for the amount of expenditure by plaintiff *over and above* what defendant advanced that the plaintiff sues here (*fol.* 29); and the answer plainly denies, and the Referee found, that no request for such amount had ever been made. In view of the fact that plaintiff now does not assert to the contrary of the fact that no such request was made, we need do no more than to refer to our main brief for a discussion of the evidence which supports such finding of the Referee (pp. 221-233).

Nor was there any thought at the trial that the matter of plaintiff's request was not in issue. Plaintiff presented evidence which we have summarized in our main brief (pp. 221-233), going to the point of whether a request had been made, but it confessedly failed to prove a request; and defendant produced evidence that a request had in fact not been made (*fol.* 5359). Plaintiff also sought to show that there had been a refusal by defendant, but failed (*fols.* 4455, 4456). Both parties presented requests to find on this issue to the learned Referee, who indicated his conclusions thereon. The matter of the request was, therefore, not only put in issue, but it was litigated on the trial; and the claim that a request for the expenditure by defendant of moneys over and beyond those which it had already furnished on request was, nevertheless, admitted by the answer is, therefore, untenable. We submit that since plaintiff failed to prove this necessary element of the alleged cause of action, the judgment below was wrong.

FIFTH PRINCIPAL QUESTION.

Plaintiff did not at the commencement of this suit own the alleged cause of action.

Plaintiff has very elaborately considered all of the many conveyances and mortgages placed in evidence. If plaintiff's forced reasoning as to each of these shows anything, it certainly shows that, in every act done by the plaintiff and its allied companies, its claim against defendant was deemed to be one which could be disposed of by any of these companies but the plaintiff. While these many instruments strengthen the proposition that the ownership of the cause of action passed out of the plaintiff, the one truly relevant and important instrument is the mortgage which actually effected the transfer. We shall, therefore, limit our reply to a consideration of the mortgage of 1st August, 1894.

POINT I.

The mortgage of 1st August, 1894, to the New York Guaranty & Indemnity Co, and the sale in the foreclosure absolutely divested the plaintiff of all title and interest in its present alleged cause of action.

Prior to March, 1894, plaintiff proceeded with the conversion work in the manner set forth on plaintiff's brief at p. 357 :

“it is evident that the parties intended
 “ that the obligation should be first incurred
 “ by the affirmative act of the plaintiff and
 “ should be thereafter discharged by the

“ application of moneys furnished by the
“ defendant.”

In March, 1894, however, it was recognized by both parties that defendant's conversion funds had been exhausted (finding 41 at *fol.* 366), and plaintiff continued the work by borrowing \$500,000 on its own credit (*fol.* 367). The moneys paid out after March, 1894, were not merely temporarily expended by plaintiff, in anticipation of the payment of its requisition the following day. They were paid literally out of its own funds from sums borrowed on its own credit without intention or purpose to make a request that defendant apply its funds to reimburse plaintiff, and without such request being made. Such moneys were, however, repayable to plaintiff at the termination of the Lease, for Article X provided :

“ The lessor further covenants and agrees
“ that, in the event of the expiration of this
“ lease, or other sooner termination thereof,
“ it will pay to the lessee the actual cost of
“ all property * * * made, acquired and
“ paid for by the lessee out of its own funds
“ for use in connection with the operation of
“ the railroads of the lessor * * * ” (*fol.*
78).

In the summer of 1894 plaintiff sought for a source of supply of more money; and the mortgage to the New York Guaranty & Indemnity Co. was arranged. This mortgage covered:

“ IV. All the right, title and interest of
“ the Heights Company in and to the amount
“ of the cost of all *property*, extensions,
“ branches, additions, improvements and
“ equipments, *heretofore and hereafter*
“ *made*, acquired and paid for by said
“ Heights Company out of its own funds,
“ for use in connection with the operations
“ of the railroads of the Brooklyn City Rail-
“ road Co. * * * such cost, as afore-

“ said, being payable, under the terms of
 “ the Lease above mentioned by said lessor
 “ company, to said lessee company, in the
 “ event of the expiration of said Lease or other
 “ sooner termination thereof ” (finding 53,
 at *fol.* 391-393).

The New York Guaranty & Indemnity Co., the Trustee under the mortgage, had, before accepting this trust, employed an accountant, Phelps, to determine what sum had been expended by plaintiff out of its own funds ; and he reported that up to the 30th June, 1894, plaintiff had so expended the sum of \$1,059,154.55 (*fol.* 8017, 8028-8030). There is no doubt, therefore, that this sum which is included in plaintiff's recovery (finding A-47 at *fol.* 599) was intended to be covered by the trust indenture.

Upon a default by plaintiff the mortgage was foreclosed, and the property pledged thereunder was purchased at foreclosure sale and by mesne conveyances vested in the Brooklyn Rapid Transit Co., having passed forever from plaintiff's ownership (findings 76 at *fol.* 423 ; 77 at *fol.* 424 ; 78 at *fol.* 425 ; 79 at *fol.* 425-477 ; 80 at *fol.* 477 ; 81 at *fol.* 478 ; 82 at *fol.* 479).

Plaintiff's only answer to this situation is, that the Lease prohibited it from making any expenditure upon conversion out of its own funds until the full \$6,000,000 had been expended (its brief, pp. 349-364). We shall shortly see that this contention is wholly wrong. But assuming for the moment that plaintiff's statement is correct, it is impossible to see what bearing it may have upon the present question. If it be granted that plaintiff's expenditures after March, 1894, were made in direct violation of a covenant of the Lease that it should make no expenditures for conversions out of its own funds until defendant's \$6,000,000 had been fully expended, that cannot alter the fact that such expenditures *were* made, and that they were made out

of plaintiff's own funds, not merely temporarily, and in anticipation of immediate reimbursement by defendant, but intentionally and without any purpose to seek such reimbursement. Having been so made, whether in violation of a covenant of the Lease or not, they were, as the Lease provided, repayable at its termination, and they passed under the mortgage, as the contemporaneous acts of the parties show they were intended to do.

But an examination of Art. XXI of the Lease, which is supposed to contain the prohibition against defendant's making conversion expenditures out of its own funds before the \$6,000,000 (plaintiff's brief, p. 363) were entirely exhausted, shows that it contains no such prohibition. The Article is as follows :

“ XXI. The lessee further covenants
 “ and agrees that it shall not have the right
 “ to and will not make or construct any
 “ *extensions, additions, branches and im-*
 “ *provements*, or furnish any equipments to
 “ the said railroad and railroads and prop-
 “ erties by this lease demised to be paid for
 “ out of its own funds * * * until
 “ after the said unissued stock and bonds of
 “ the lessor shall have been issued and the
 “ proceeds realized upon the sale of said
 “ stock and bonds shall have been expended
 “ as in this lease provided, and that it will
 “ not construct or apply for the right to
 “ construct any extension or branch of said
 “ railroad or railroads without first obtain-
 “ ing the consent in writing of the lessor
 “ thereto” (*fols. 92, 93*).

There is here no prohibition against plaintiff's making “conversion expenditures” out of its own funds before the \$6,000,000 were expended, but it merely prevented plaintiff from entering on new enterprises before the conversion was completed. As plaintiff correctly says, on p. 351 of its brief :

“ The purpose of this provision was evi-

“dently intended to secure the conversion
 “of these railroads into an electric system,
 “preserved in its entirety as such as se-
 “curity for the return to the defendant of
 “the very large sum reserved as rental and
 “not embarrass such situation by any ex-
 “pensive system of *new construction or ex-*
 “*tensions* which might exhaust the funds of
 “the plaintiff, and thus prevent it from
 “fulfilling the terms and conditions of the
 “lease.”

The distinction between conversion expenditures and those in new ventures was sharply made in Art. V of the Lease, which provided that

“the proceeds of said stock and bonds,
 “less any premium realized or received on
 “the sale of the said bonds, shall be ex-
 “pended by the lessor in payment, at the
 “request of the lessee, from time to time of
 “the cost of *converting* the railroads of the
 “lessee into an electric railroad or into any
 “other kind of railroad authorized by law,
 “which shall be approved of by the lessor
 “and lessee” (*fols.* 70, 71),

and then went on further to provide that

“if all of such proceeds be not required
 “for such purpose, then any balance shall
 “be expended by the lessor in payment as
 “aforesaid of the cost of such *additions,*
 “*improvements, extensions, branches and*
 “*equipments* to the said railroads and prop-
 “erties of the lessor as in its judgment
 “and in that of the lessee shall be neces-
 “sary or advantageous to the property of
 “the lessor or the interest of the lessee”
 (*fol.* 71).

But expenditures made by plaintiff in 1894 were concededly all made in the work of electrification and did not include extensions (*fol.* 8015); and for plaintiff to make them out of its own funds was in conflict with no provision of the Lease.

There can be, therefore, we submit, no question but that plaintiff's cause of action for the cost of conversion now sued for by it passed under the mortgage of 1st August, 1894, and through foreclosure and mesne conveyances, to the Brooklyn Rapid Transit Co., which in turn mortgaged it to the Central Trust Co. (finding 83 at *fols.* 480, 486-489).

SIXTH PRINCIPAL QUESTION.

The Referee's deduction of the amount of defendant's conceded payments for cost of conversion after 6th June, 1893.

Plaintiff argues that the deduction of \$324,476.81, being the amount of the principal of the \$308,340.35 note together with \$16,136.46 of interest paid by plaintiff thereon, should be sustained on the following theory stated in its brief (pp. 186, 187):

“ The payment to the defendant of the
 “ principal and interest of the note, was, in
 “ substance and effect, a payment back to
 “ the defendant of that amount of its gross
 “ expenditures in performance of its conver-
 “ sion obligations, and the deduction of the
 “ amount paid on the note from such gross
 “ amount of expenditures was properly made
 “ by the Referee.”

These words of plaintiff afford, we submit, no reason or justification for the action of the Referee in deducting the \$324,476.81 from the amount which defendant expended in payment of the cost of conversion after 6th June, 1893. For the sake of clearness let us assume that defendant had expended all of the \$6,000,000 after 6th June, 1893; but that upon an accounting it had been determined between the parties that it had actually advanced as much as \$6,308,340.35, and that accordingly a note for \$308,340.35 had been given, which was later paid by plaintiff; would it have been in such case at all arguable that such sum of \$308,340.35, if recoverable at all, should be recovered under a complaint which stated that defendant had agreed to expend in conversion after 6th June the sum of \$6,000,000,

but that though requested so to do, it had failed of said amount to expend the sum of \$308,340.35?

Yet there is absolutely no distinction between that supposititious case and the one at bar. The Referee found that defendant had advanced to plaintiff the sum of \$4,626,751.27 (finding XXXVIII at *fol.* 694), of which \$42,532.84 was devoted to the payment of its operation obligations (finding XXXIX at *fol.* 696), so that in fact only the difference between these two sums, that is, \$4,584,218.43, was applied to the payment of the cost of conversion. But this sum of \$4,584,218.43 *was* so applied; and under a complaint stating a cause of action for the recovery of moneys not so applied after 6th June, 1893, no more than the difference between such sum and \$6,000,000 can in any event be recovered.

This point does not embrace the questions of whether the parties in fixing on the amount of the \$308,340.35 note adopted the right theory or took into account the right items; these questions we have discussed as our *First Principal Question* (main brief, pp. 56-147; *supra*, pp. 4-40) and *Seventh Principal Question* (main brief, pp. 279-336; *infra*, pp. 81-87). Nor do we consider here the binding force of the Tripartite Agreement under which the note was given; that is argued by us as the *Second Principal Question* (main brief, pp. 147-212; *supra*, pp. 41-57). We are here concerned to show only that in the complaint no cause of action is stated for the recovery of the amount of the note, and the Referee's allowing such recovery was error.

SEVENTH PRINCIPAL QUESTION.

The original and intrinsic fairness of the adjustment by the Tripartite Agreement. The merits of the \$308,340.35 note, and of the Journal Entries.

Plaintiff has throughout its brief seen fit to charge with the most unworthy motives the men who were its directors in the year 1894. To this part of its discussion we have made no reply, nor shall we make one. Most of the excuse for this calumny plaintiff finds in the so-called "journal entries," which were allowed to defendant in the Tripartite adjustment. These concededly represented moneys actually expended by defendant, and the only question with respect to them is, whether they were properly treated by plaintiff and defendant upon the accounting in 1894 as construction charges. We have fully discussed all of the facts concerning them in our main brief (pp. 297-336); we submit that it appears from these facts that, irrespective of whether each one of them was completely accurate, yet all were made upon proper reasons and in entire good faith. Of the \$670,542.92 of "journal entries," plaintiff now concedes the correctness of the following :

Groups I and II (our main brief, p.	
298 ; resp. brief, p. 225),	\$50,000.00
Group III (our main	
brief, p. 299 ; resp.	
brief, p. 235):	
Interest before Feb.	
14, 1893, the	
proper payment of	
which is not chal-	
lenged,	\$27,619.67

Interest after 6th June, 1893 (find- ing XXXVIII at <i>fol.</i> 693)	4,132.05	
	<hr/>	31,751.72
Group V (our main brief, p. 299; resp. brief, pp. 226, 233, 234):		
Transfer to real es- tate (finding A-35 at <i>fol.</i> 559)	\$80,000.00	
Transfer to equip- ment (finding 21 at <i>fol.</i> 340)	150,245.79	230,245.79
	<hr/>	<hr/>
Concededly correct journal entries,		\$311,997.51

There remains challenged, therefore, only the
sum of \$358,545.41, made up as follows :

Group I of our main brief (p. 298)	\$137,797.03	
Group II of our main brief (p. 298)	24,000.00	
	<hr/>	
	\$161,797.03	
Less, <i>supra</i> , p. 81,	50,000.00	\$111,797.03
	<hr/>	
Group III of our main brief (p. 299)	\$53,724.94	
Less, <i>supra</i> , pp. 81, 82	31,751.72	21,973.22
	<hr/>	
Group IV of our main brief (p. 299)		90,000.00
Group V of our main brief (p. 299)	\$365,020.95	
Less, <i>supra</i>	230,245.79	134,775.16
	<hr/>	<hr/>
		\$358,545.41

With these remaining items we do not need here to deal in detail, because of the full presentation of all that the record contains concerning them which has been made in our main brief * (pp. 297-336).

We feel bound, however, to mention the elaborate mystification which plaintiff resorts to in discussing the journal entry of \$90,000 (its brief, pp. 203-206). Although treated by plaintiff as an entry of which no possible explanation could be given, the facts are the simple ones set forth in our main brief (p. 329). On 3rd January, 1893, defendant issued \$3,000,000 of its capital stock, the proceeds of which were devoted to paying conversion cost. Although this money was not producing income to the Company, the stock inevitably shared in the regular quarterly dividends of two per cent. which were declared on 28th March, 1893, and 30th June, 1893 (*fol.* 3936, 3934), so that dividends were paid thereon on those dates amounting to \$120,000. The payment of this portion of the general dividend then declared was a resultant expense of the conversion work, and did not represent earnings of the capital on which the dividends were paid. Since, however, money could have been borrowed by defendant with which to carry on the conversion work, upon interest at the rate of six per cent., while the dividend was declared on an eight per cent. basis, defendant's directors deemed it right that only \$90,000 of the whole \$120,000 paid should be charged to construction (*fol.* 947, 948).

* FOOT NOTE : We feel bound, however, to correct an erroneous statement in our main brief (p. 310), to which plaintiff calls attention in its brief at p. 214, to the effect that no specific trucking charges were made in the capital account during the fiscal year, and that, therefore, the transfer of \$43,680 to the capital account was imperatively required. A more careful inspection of the bill of particulars reveals therein charges for trucking aggregating \$12,869.17, at *fol.* 8199, 8208, 8240, 8538, 8541, 8548, 8550. But that this relatively small sum sufficed to pay for the trucking during the entire year when over \$3,000,000 of work was done is unthinkable; and the propriety of the journal entry for trucking is not affected by the occasional charges made during that year.

We may incidentally also point out certain errors in plaintiff's tabulations given on pages 236 to 238 of its brief.

1. In calculating the surplus as of 14th February, 1893, the assumption is made that the \$90,000 journal entry referred to expenditure made prior to that date. The evidence is clear that it represented a portion of the dividends paid on 28th March, 1893 and 30th June, 1893. Defendant's surplus as of 14th February, 1893, was not, therefore, \$829,558.86, as shown on p. 236 of respondent's brief, but \$739,558.86, and in lieu of there being a deficit of floating assets to pay surplus on that day as claimed by plaintiff on p. 238 of its brief, they more than covered the surplus, as follows :

Floating assets after paying obligations, as stated by respondent (its brief, p. 238).....	\$806,853.76
Surplus.....	739,558.86
	<hr/>
Excess of floating assets over surplus.	\$67,294.90

2. In calculating defendant's total construction expenditures prior to 14th February, 1893, plaintiff again wrongly includes the \$90,000 item. The striking out of this item from the calculation reduces the supposed excess of expenditure on 14th February, 1893, to \$217,726.05. Plaintiff admits and asserts that, after 14th February, 1893, there were sold certain real estate and other property for sums aggregating \$259,179.83 (finding A-37 at *fol.* 562, 563); so that this apparent over-advance of \$217,726.05 (which figure, as plaintiff concedes at p. 237 of its brief is, to some extent at least, excessive), was not deducted from the \$6,000,000 fund, but was more than taken care of by the sales of property which immediately followed.

All of this calculation by plaintiff, even were it correct, is wholly immaterial and goes not a step toward indicating the correct construction of the Lease. Defendant had considered the transforming of its lines into electric lines as early as 1890 (*fol.* 5256), and when it did conclude to make this conversion, it procured an increase of its capital stock from \$6,000,000 to \$12,000,000, in the late part of 1891 (*fol.* 7046) and, in addition, made a mortgage of its property, retaining \$3,000,000 of the bonds secured by such mortgage as treasury bonds (*fols.* 7050, 7053, 7054). These unissued stocks and bonds amounting to \$9,000,000 were the fund which defendant had provided for itself for conversion purposes. It was the plan of the Lease that this fund should be turned over to the lessee. That was also the theory on which the Tripartite adjustment was made, and we restate here, in slightly modified form, so far as concerns the "journal entries," the table printed on pp. 294-296 of our main brief, which sets forth in some detail the sums going to make up defendant's expenditures.

*Statement of Defendant's Capital Expenditures
on Railroads Leased to Plaintiff.*

Expenditure prior to February 14th, 1893 (finding A-76, <i>fol.</i> 631)....	\$12,424,645.65
Expenditure subsequent to 14th February, 1893 (finding A-36, <i>fols.</i> 560, 561).....	6,400,483.14
Expenditure subsequent to 14th February, 1893, inadvertently omitted from finding (Stipulation, <i>fols.</i> 1238, 1239).....	5,993.88
Expenditures represented by Journal Entries, the correctness of which is conceded by plaintiff (\$311,- 997.51 as shown <i>supra</i> , p. 82, less \$84,132.05 included in finding A-36).....	227,865.46

Expenditures represented by Journal Entries, the correctness of which is not conceded by plaintiff (<i>supra</i> , p. 82).....	358,545.41
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Various items correcting defendant's books, from which the figures heretofore given were taken and which are listed on Defendant's Exhibit 1467, at page 3187 of the record	24,236.81
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\$19,441,770.35

Deduct :

Items of real estate, etc. sold, listed in finding A-75 at <i>fol.</i> 629.....	\$192,889.26
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Rebates, by clerical error not included in finding A-75, but found in finding A-37 at <i>fol.</i> 563 (aggregating \$18,284.33 found in A-37 less \$2,438.13 allowed in A-75)...	15,846.20
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Items of defendant's operating expenses before 6th June, 1893, thereafter paid by plaintiff....	41,349.95	250,085.41
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Total amount of defendant's moneys invested in railroad	\$19,191,684.94
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Amount of defendant's authorized capital stock and bonds.....	18,925,000.00
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Amount of defendant's surplus invested.....	\$266,684.94
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Interest on surplus invested.....	41,665.41
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\$308,340.35

This was the amount of the note given by plaintiff under the Tripartite Agreement, which was paid to defendant on 18th June, 1895 (*fol.* 549), so that defendant received back the sum which it had over-advanced to plaintiff. The contention made by plaintiff that this note was without consideration is wholly erroneous, because it was given with reference to the charges above noted which were accepted on the settlement, and instead of requiring immediate payment of the account stated defendant extended the time for payment by acceptance of the note.

EIGHTH PRINCIPAL QUESTION.

Platutlff's right to recover for moneys expended not by itself, but by the Disbursing Committee.

The Referee in calculating what were plaintiff's expenditures out of its own funds prior to 26th October, 1894, included \$862,964.75 (finding A-42 at *fols.* 568-570) paid by the Disbursing Committee from moneys derived, not from plaintiff, but under the mortgage of 1st August, 1894, made by the plaintiff and the Long Island Traction Company, and under the Tripartite Agreement (finding A-20 at *fols.* 549, 550). Plaintiff admits, therefore, that the moneys paid out by the Disbursing Committee were not the plaintiff's moneys; and they were in fact obtained by the pledge of all of its own property by the Long Island Traction Co. That Company pledged, *first*, the capital stock of the Heights Company, which was all owned by it (*fols.* 4940, 4941); *secondly*, all of its rights to the entire capital stock of the Brooklyn, Queens County & Suburban Railroad Co., which was likewise all owned by it, subject to go to defendant, in case of default in performance of plaintiff's obligations under the Lease, as appertaining to securities in the \$4,000,000 guaranty fund (*fols.* 4941, 4942); and, *thirdly*, all of its rights in the guaranty fund, which had been furnished by it (*fols.* 4942, 4943). Plaintiff itself pledged only its claim against defendant, which would mature upon the termination of the Lease (*fols.* 4943-4945).

Plaintiff asserted as its measure of damages for defendant's alleged breach of covenant, the amount

which it had been compelled to expend and had expended out of its own funds as a consequence of defendant's alleged default (complaint, *fol.* 29). This was also its own later view of its cause of action, as briefly stated on p. 36 of its printed reply brief before the Referee :

“The action is an action to recover damages caused by the failure of the defendant to perform certain obligations imposed upon it by the Lease. Plaintiff proved that defendant did not spend the \$6,000,-000 as provided by the Lease. * * * In order to make this proof, it was necessary to prove exactly what the defendant did spend out of the fund. Then, in order to show that the plaintiff was damaged, it had to show that it did itself spend this amount in addition to the amounts paid over by the defendant.”

That having been the theory of the complaint, it is clear that there can be no recovery for the sums expended by the Disbursing Committee, which were in no sense furnished by plaintiff. If B break a covenant by the breach of which A is damaged only if he be put to resultant expense, it is plain that he cannot recover more than nominal damages if he foregoes making this expense, even though a third party, C, for any reason should make it—*i. e.*, should do for A what the original contractor, B, ought to have done.

But plaintiff relies on the agreement of 24th March, 1896, with the Brooklyn Rapid Transit Company, which owned all of its stock (findings A-9 at *fols.* 538, 539 ; 49 at *fol.* 383) to relieve it from this defect in its case (its brief, pp. 179, 180). This agreement is of a remarkable character. It recites that the Long Island Traction Company had pledged its property to obtain money which was expended for plaintiff's benefit (*fols.* 490, 491), and that such property had been sold upon foreclosure,

so that the Traction Company had been stripped of its capital, and solely for plaintiff's advantage (*fol.* 491). In equity, therefore, the agreement declared, plaintiff was bound to pay the amounts which the pledge of the Long Island Traction Company's property had secured for plaintiff (*fol.* 494).

These recitals amounted to a complaint on behalf of the Traction Company, the gist of which was that it had been compelled to let its property go to the Brooklyn Rapid Transit Company for plaintiff's benefit, and that it ought to be compensated for the loss.

But the Traction Company was not compensated by the agreement of 24th March, 1896. The Brooklyn Rapid Transit Company claimed by virtue of its ownership of what had been the assets of the Traction Company to succeed to its rights to collect the compensation supposed to be due to it, because of the very fact that the assets *had gone* to the Brooklyn Rapid Transit Company (*fol.* 493; and see plaintiff's brief, p. 179); so that that Company got not only the Traction Company's assets, but likewise the compensation which should have gone to the Traction Company for the loss of them. The Traction Company, so far as appears from the record, is still an existing corporation; and it appears affirmatively that it was in existence as late as May 17, 1898 (*fol.* 8166). The "compensation" fixed upon was an annual payment of five per cent. during the term of the Lease upon all sums which had theretofore and might thereafter be expended on the demised properties for betterments or improvements (*fol.* 495-498); and the evidence shows that on 30th June, 1902, such amount had risen to \$5,380,476.79 (def's exh. 1490 at p. 3215, vol. 8), and the Referee found that as early as 30th June, 1898, interest at five per cent. was payable by plaintiff to the Transit Co. under the agreement of 24th March, 1896, upon an amount as high as \$4,030,120.86 (finding A-21 at *fol.* 550, 551). Had that

“compensation” been made to the Traction Co., to whom, if to anyone, it was due, its stockholders would have received considerably more than the \$8 a share which they did receive on the distribution of the surplus proceeds of the foreclosure sale.

We do not contend that the agreement of 24th March, 1896, was in any sense void. Indeed, we have argued that, if anything more had been required to strip plaintiff entirely of any vestige of interest in the alleged cause of action upon which it sues, that was accomplished by this very agreement (main brief, p. 263). It is true that plaintiff and the Brooklyn Rapid Transit Co. have, and always have had, common directors; but the Transit Co. owns all of plaintiff's capital stock, so that their acts are not impeachable, unless they should be in fraud of plaintiff's creditors, and then only by those creditors. But we do contend that this agreement in no way can make up for the fact admitted therein, that plaintiff did not furnish the money which the Disbursing Committee expended. The Traction Co., which had provided substantially all of the security upon which the money was obtained, was not reimbursed by plaintiff. In very truth, the arrangement that plaintiff pay five per cent. annually upon whatever at any time might be expended upon betterments or improvements of the demised railroads, was entirely incongruous with the idea of any such reimbursement, but was a device based upon a brazenly illogical excuse, to transfer plaintiff's moneys to the Brooklyn Rapid Transit Co. so that plaintiff's own profits should be as small as possible. But in addition to the fact that it was not, nor really intended to be, a reimbursement, it is even more important to note that it was not the corporation to which plaintiff owed the obligation, if any, to make reimbursement, that was to receive the payments provided for in the agree-

ment of 24th March, 1896. On the contrary, they were provided to be given to the Brooklyn Rapid Transit Co., which was entirely unconnected with the transaction and to which absolutely no obligation was owing in relation thereto. Through its ownership of all of plaintiff's stock the Transit Co. compelled plaintiff to make it a sheer gift; but the making of such gift was no damage flowing from the supposed default of defendant or in any way related to it.

The \$862,964.75 included in the Referee's finding A-42 (*fols.* 568-570), were, therefore, in no sense expended by plaintiff, and to that extent at least, plaintiff has produced no evidence of damage from defendant's alleged default.

NINTH PRINCIPAL QUESTION.

The \$1,616,080.15 of interest.

Plaintiff claims that the amount of its judgment was capable of "mathematical computation" (its brief, p. 416); that a demand for its amount was unnecessary to start the running of interest (its brief, p. 417); that equitably plaintiff is entitled to interest (its brief, p. 419); and upon these grounds it claims that the Referee was right in making his allowance. Plaintiff is mistaken, as we shall show, in each of these positions. But, first, we again call to the attention of the Court a phase of this question treated in our main brief which plaintiff entirely neglects—that the accounts between the parties had been settled by the accounting of 1894 embodied in the Tripartite Agreement, and that no money was or could be owing from defendant to plaintiff unless and until that Agreement were set aside.

POINT I.

The Tripartite Agreement having remained unavoids and in force until the Referee's decision is a bar to the recovery of interest.

By the Tripartite Agreement a final settlement had been reached between the parties, and their financial relations arising out of the Lease had been completely adjusted. We have already argued that this Agreement was definitively ratified as to the plaintiff by the approval of the Long Island Traction Co. (*supra*, p. 42); and, passing

that point, that it was further ratified by long acquiescence and inaction (*supra*, p. 54). But so far as concerns the question of whether the Referee were right in allowing interest to plaintiff upon the principal of the judgment from 26th October, 1894 (*fol.* 712), we need only point out that, whether definitively ratified or not, the Agreement was at least capable of such ratification, and that until disaffirmance it was completely valid. Such was the holding of this Court in *People v. Republic Savings & Loan Association*, 97 App. Div., 31. The corporation had employed its directors as agents at a high rate of compensation. Upon its insolvency these presented their claims for services at that rate. It was held that their claims should be allowed, for the reason that when the services were rendered the contract had been in full force. The Court said, by WILLARD BARTLETT, *J.*, at p. 34:

“ But in a case of a contract merely void-
 “ able and not void *ab initio*, the rights of
 “ the party seeking to enforce it are unin-
 “ paired up to the time of disaffirmance, and
 “ either party cannot be deprived of any
 “ money payable to him thereunder, actually
 “ earned, pursuant to the terms of the con-
 “ tract, prior to the date when it is dis-
 “ affirmed.”

From the time when the Tripartite Agreement was executed to the time when the Referee filed his decision there was nothing owing from defendant to plaintiff. During all the years before suit was brought the accounts between the parties were closed, and there was no cause for defendant to make tender of any money to plaintiff. To charge defendant with interest for this period is, we submit, wholly unjustified. Nor does the commencement of the action alter this aspect of the case. The Tripartite Agreement was not mentioned in

the complaint, and the action was brought, not in disaffirmance of the Tripartite Agreement, but in defiance of it. Plaintiff says even now in its brief that—

“ This is not an action to set aside the
“ tripartite agreement” (p. 339).

There was no avoidance of the Agreement until the Referee filed his decision. Until that time, and for all the previous time during which the accounts between plaintiff and defendant were closed, plaintiff was not entitled to interest.

POINT II.

Plaintiff's claim was not one upon which interest could be allowed.

Plaintiff in its brief does not deny the doctrine amply established on pp. 356-362 of our main brief, that, as expressed by BRADLEY, J., in *Mansfield v. N. Y. C. & H. R. R. Co.*, 114 N. Y., 331, at p. 339, the rule allowing recovery of interest

“ has not been extended to actions to re-
“ cover unliquidated damages for breach of
“ contract, *unless the means are accessible*
“ *to the party sought to be charged of ascer-*
“ *taining the amount*, by computation or
“ otherwise, to which the other party is en-
“ titled.”

Plaintiff states, however, that the amount of its recovery was capable at any time of mathematical ascertainment, so that as soon as its cause of action is supposed to have accrued, that is, as the Referee found, on 26th October, 1894 (*fol.* 712), defendant had it in its power to ascertain and tender the amount of its supposed indebtedness.

Such contention of plaintiff is, we may note, directly at variance with plaintiff's other claim that it employed due diligence in determining its alleged rights after new officials, and more particularly Mr. Williams, came into its management in 1895 (*fol.* 4770). Undoubtedly, plaintiff was, during the five years previous to bringing this action, guilty of the greatest *laches* in not asserting its claim that the Tripartite Agreement was not binding upon it, since it knew of the existence of the Tripartite Agreement, of the notes given thereunder, and of the fact that its former directors had been stockholders of the defendant. Nevertheless the sum recovered by plaintiff is not so simply derived that it could be ascertained by a mere computation.

This will be apparent from only a brief consideration of the manner in which the amount of plaintiff's judgment is determined. It involves two factors—the first, the amount which defendant is supposed to have failed to have expended of the \$6,000,000 (findings Twelfth at *fol.* 740; XXXVIII at *fols.* 692–694; XXXIX at *fols.* 694–697); and the second, the amount which, on 26th October, 1894, plaintiff had expended upon the railroad over and above amounts advanced by defendant (findings Thirteenth at *fol.* 741; supplemental at *fols.* 712, 713; A-42 at *fols.* 567–573).

On 24th April, 1903, three years after the commencement of the action, after the accountants for both parties had thoroughly gone over defendant's books, plaintiff "tendered" a "proposed stipulation" to defendant (*fols.* 1232–1243), from which it appears that, after all the supposedly diligent mathematical computation for five years before suit was brought, and the efforts of its accountant in preparing its case during the first three years of the progress of the action, plaintiff was prepared to allow to defendant an expenditure after 6th June,

1893, of \$4,228,881.47,* as compared with the \$4,259,741.62 which the Referee finally allowed at plaintiff's instance (finding XXXIX at *fol.* 697).

Among the reasons for this inaccuracy in a supposedly unfailable mathematical calculation was that after 6th June, 1893 defendant, of course, paid for many things which had been done before that date. Just what that amount was had to be determined, not by calculation, but by the oral examination of witnesses, whose evidence was taken on the trial (*fol.* 1300-1756). The stipulation tendered stated that defendant had made direct payments after 5th June, 1893 amounting to \$328,416.10 (*fol.* 1235), of which \$11,697.03 was attributable to a period prior to 14th February, 1893, \$70,826.67 was for work done between 14th February and 6th June, 1893, and \$27,364.28 belonged undeniably to the period after 6th June, 1893. The remainder, \$218,528.12, represented, said the stipulation,

“ items of materials furnished and labor
 “ performed, as to the date of delivery or
 “ furnishing of which the plaintiff and de-
 “ fendant differ, and as to these items the
 “ plaintiff will offer proof ” (*fol.* 1236).

Another cause for this uncertainty, after years and years of computation, were the journal entries. The “proposed stipulation” stated that as to these, amounting to \$673,542.92,

“ plaintiff denies that any portion thereof

* *Footnote:* This sum is derived as follows:

Amount allowed in paragraphs VI and VII of the stipulation (\$5,645,560.92 less \$1,447,- 789.21, <i>fol.</i> 1237, 1238).....	\$4,197,771.71
Amount allowed in paragraph VII (1) (\$5,993.88 less \$2,248.40, <i>fol.</i> 1238, 1239)..	3,745.48
Amount allowed in paragraph IV (<i>fol.</i> 1235, 1236).....	27,364.28
	<hr/>
	\$4,228,881.47

“ is a proper credit on the defendant’s obligation to expend the aforesaid sum of \$6,000,000 ” (*fol.* 1242, 1243).

Yet, after proof was taken, plaintiff was compelled, in its request to find submitted to the Referee, to allow two sums, \$13,542.10 and \$4,132.05 (finding XXXVIII, *fol.* 693) out of these journal entries as having been expended on conversion done after 6th June, 1893.

Again, plaintiff claimed that it had paid \$46,454.02 of defendant’s operation obligations (*fol.* 1240), though it was credited with but \$41,349.95 on defendant’s books (def’s exh. 1457, vol. 7, p. 3054a). Proof was taken (*fol.* 1244-1299), and at plaintiff’s instance the Referee found the amount to be \$42,532.84 (*fol.* 696).

If this matter of mere computation was so undefined, after more than a year and a half of work subsequent to the commencement of the action by Mr. Hourigan, plaintiff’s expert accountant (*fol.* 1121), it is plain that, at the commencement of the action, neither party had any data from which an amount could be determined. This is shown in the letter of 2nd March, 1900, written to defendant four days before the commencement of the action (finding A-46 at *fol.* 583-593). This letter demanded payment of the amount of certain journal entries on defendant’s books, not because they represented work done before 6th June, 1893, but because they were not in themselves proper charges to construction account. We have fully summarized this letter at pp. 352-354, 364-367 of our main brief. The journal entries claimed to be improper amounted to \$778,583.34 (main brief, p. 354); of these, entries amounting to \$106,432.18 were not even attacked on the trial (main brief, p. 367); of the remaining items the Referee found that \$234,377.84 were proper charges, while plaintiff now concedes

\$77,619.67 in addition, making \$311,997.51 in all (*supra*, p. 82).

As to the amounts expended between 14th February and 6th June, 1893, which plaintiff's lawyers had advised it had a right to receive from defendant, plaintiff merely asked that "an accounting be had" (*fol.* 592).

We submit that, from the foregoing summary, it is plain that the ascertainment of the amount less than \$6,000,000 not expended by defendant for work done after 6th June, 1893, and upon which depended the amount of defendant's supposed indebtedness, was more than a mere matter of computation, so as to be ascertainable for the making of a proper tender.

That the same is true of the value of work done by plaintiff in excess of the amounts advanced by defendant is shown by the fact that the learned Referee, again acting at plaintiff's request, originally found that \$1,740,258.38 over and above amounts for which plaintiff had been reimbursed by defendant, had been expended by plaintiff prior to 1st September, 1894 (finding XLII at *fol.* 700). Under no possible view of the evidence could this result be reached, and by a supplemental finding the date was fixed at 26th October, 1894 (*fols.* 712, 713). The calculation shown in finding A-42 (*fols.* 567-572) clearly proves that this date is also erroneous. From defendant's conceded reimbursements to plaintiff for the expenditure listed in such finding, and which amounted to \$594,506.70 (*fol.* 571), there is deducted the amount of the \$308,340.35 note (*fol.* 572). This note, as the Referee found, was not paid to defendant until 25th June, 1895 (finding A-19 at *fol.* 549); then it was paid by Flower & Company and not by plaintiff. So that, at any rate, on 26th October, 1894, plaintiff still had all of the \$594,506.70 of moneys which defendant had paid to it to reimburse it for the advances

listed in finding A-42, and it was improper, if the deduction could be made at all, to make such deduction in a calculation as of 26th October, 1894.

A more serious question not ascertainable by computation is presented by the \$862,964.75 of Disbursing Committee payments, which, as plaintiff's own agreement of 24th March, 1896, stated, were made "without any adjustment of the respective portions of such indebtedness which said two companies" (plaintiff and the Long Island Trac-tion Company) "may be deemed to have paid" (*fol.* 491).

In every aspect, therefore, plaintiff's claim was not one susceptible of determination by computa-tion at the time when it is supposed to have ac-crued.

POINT III.

There was no demand by plaintiff to set in-terest running against defendant.

This we have argued at pp. 364 to 368 of our main brief; and the necessity for a demand to set interest running is emphasized by the very cases which plaintiff cites (its brief, p. 417).

Sweeny v. City of New York, 173 N. Y., 414, by CULLEN, J., at p. 416:

"In *White v. Miller* (78 N. Y., 393) there
 "is to be found a full discussion of the lead-
 "ing authorities in this state on the subject
 "of interest. Judge EARL there said:
 "The cases last cited tend to show that
 "where an account for services or for
 "goods sold or delivered, which has be-
 "come due and is payable in money, al-
 "though not strictly liquidated, is pre-
 "sented to the debtor and payment
 "demanded, the debtor is put in default

“ ‘ and interest is set running, and that, if
 “ ‘ not demanded before, the commence-
 “ ‘ ment of suit is a sufficient demand to set
 “ ‘ the interest running from that date.’

“ In *de Carricarti v. Blanco* (121 N. Y.,
 “ 230) the statement of Judge EARL which
 “ I have quoted is accepted as enunciating
 “ the correct rule of law on the subject.”

Kervin v. Utter, 120 App. Div., 610, by SPRING,
J., at p. 613 :

“ Interest is to be computed from the time
 “ payment of the claim was demanded
 “ (*O’Keefe v. City of New York*, 176 N. Y.,
 “ 297; *Sweeny v. City of New York*, 173 *id.*,
 “ 414).

“ As already indicated, all the outlay was
 “ made prior to December 21, 1882, but
 “ there is no proof of a specific demand
 “ prior to the commencement of the action.
 “ Inasmuch as interest is allowable from the
 “ time demand was made, the commence-
 “ ment of the action will be deemed a de-
 “ mand setting the interest running (*White*
 “ *v. Miller*, 78 N. Y., 393).”

No interest could, therefore, be recovered by
 plaintiff in any event for the period before the com-
 mencement of the action. But the complaint, in
 demanding the blanket sum of \$2,000,000 (*fol.* 33)
 is so indefinite that it cannot operate as a demand
 to set interest running.

Excelsior Terra-Cotta Co. v. Harde, 90 App.
 Div., 4; affirmed 181 N. Y., 11, by McLAUGHLIN,
J., at 90 App. Div., p. 8 :

“ The contract did not in express terms
 “ provide for interest, and a demand was,
 “ therefore, necessary to set interest run-
 “ ning, and it is well settled that when such
 “ demand is necessary it must be for the
 “ amount due, and if it includes any item
 “ not recoverable the demand is illegal and
 “ interest cannot be allowed. (*Cutter v.*

“ *Mayor*, 92 N. Y., 166; *Deering v. City of New York*, 51 App. Div., 402; *Carpenter v. City of New York*, 44 id., 230). ”

Cutter v. Mayor, 92 N. Y., 166, by DANFORTH, J., at p. 169 :

“ Where, however, a demand is necessary
 “ as a foundation for a claim of interest, it
 “ must be a distinct demand for the sum of
 “ money to which the party is then en-
 “ titled. It is not enough that by some
 “ change in circumstance, brought about
 “ by his own act or the act of others, he
 “ may become entitled to it. Here the de-
 “ mand included more than the plaintiffs
 “ could justly claim, for until discharged of
 “ record the amount of the mortgage debt
 “ was to be withheld.”

The plaintiff nowhere indicates that the action was brought to recover for an amount less than \$6,000,000 advanced by defendant after 6th June, 1893. The words in which the supposed cause of action was expressed were not only consistent with, but were thoroughly apt for the claim that defendant should be held liable for a deficit in expenditure below \$6,000,000 after 14th February, 1893, and so in its printed brief before the Referee plaintiff devoted as much space to calculations based on the 14th February date, as it did to those based on the later date. This has its bearing upon the admission, or rather assertion, of the answer that defendant had expended, and had been requested to expend, the full \$6,000,000. And also shows that the complaint could in no sense be construed as a demand for all the moneys which had been expended before 6th June, 1893, and for which plaintiff has recovered over again in this action.

Plaintiff claims that a demand was excused. With this contention we have already fully dealt (*supra*, pp. 66-69). But there is a further answer to

this contention of plaintiff's. Even if there had been a refusal by defendant sufficient to absolve plaintiff from performing conditions precedent to its recovery (and to have that effect, its refusal to advance further moneys would have had to be an unqualified and unequivocal repudiation—*National Contracting Co. v. Hudson R. W. P. Co.*, 110 App. Div., 137; *New England Iron Co. v. Gilbert R. R. Co.*, 91 N. Y., 156, 167; *Davison v. Associates*, 71 N. Y., 333, 338; *Dingley v. Oler*, 117 U. S., 490, 501) such refusal would have established only defendant's *default*, and would not have set interest running. Since plaintiff's claim was unliquidated, even if we were for the moment to assume that its amount were ascertainable by computation, nevertheless as the authorities cited *supra*, pp. 100–102 show, interest would begin to run only *after* default and *upon demand* for a sum due at the time the demand was made.

POINT IV.

The allowance of interest is inequitable.

Plaintiff claims that it has paid rental amounting to \$174,000 yearly for sixteen years upon the principal of the judgment, the total of such rental being \$2,784,000; and that therefore the allowance to it of interest at the rate of six per cent. is truly inadequate (its brief, p. 419). This, as the Court will itself have already seen, is an entire misstatement. Plaintiff has paid rental at the rate of ten per cent. on \$12,000,000 of stock, and interest at the rate of five per cent. on \$6,925,000 of bonds. We have seen that without regard to the evidence of further expenditures, or concessions made by plaintiff on this appeal (*supra*, pp. 81, 82), but resting

solely upon the Referee's findings, defendant expended upon the demised railroad the sum of \$18,419,241.16, leaving the difference between this amount and \$18,925,000, the sum upon which plaintiff paid rental, no more than \$505,758.84 (*supra*, p. 1). Nor did plaintiff pay as much as ten per cent. upon such balance. There is no dispute that, under any theory of the case, the proceeds of the \$3,000,000 of stocks which were issued in the Fall of 1893 (*fol.* 8960) were all actually expended in the conversion work. If anything remained unexpended it was, as we have seen, but a part of the \$1,140,000 received from the sale of bonds in March, 1894 (*fol.* 8961), and upon this amount plaintiff pays but five per cent. interest. It is, therefore, manifestly unjust that defendant should pay to plaintiff interest at the rate of six per cent. upon \$1,740,218.38, when, conceding every disputed question in the case to plaintiff, it has paid interest only on the sum of \$505,758.84, and that at the rate of five per cent.

FINALLY.

The judgment appealed from should be reversed upon the facts and the law, and a new trial ordered, with costs to appellant to abide the event.

NEW YORK, NOVEMBER, 1911.

CHARLES F. BROWN,
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